

ENTERED

APR 24 1959

F 2302

San Francisco Law Library

436 CITY HALL

No. 163496

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

3029

No. 14,053

IN THE

United States Court of Appeals

For the Ninth Circuit

BRIGILDO RESURRECCION-TALAVERA,
Appellant,

VS.

BRUCE G. BARBER, Individually and as
District Director of Immigration
and Naturalization,
Appellee.

APPELLEE'S REPLY BRIEF.

LLOYD H. BURKE,
United States Attorney,
CHARLES ELMER COLLETT,
Assistant United States Attorney,
422 Post Office Building,
Seventh and Mission Streets,
San Francisco 1, California,
Attorneys for Appellee.

FILE

MAR - 7 19

PAUL P. O'BRIEN

Subject Index

	Page
Introductory statement	1
Jurisdiction	3
Statutes involved	4
Question presented	5
Argument	7
Conclusion	15
Appendix.	

Table of Authorities Cited

Cases	Pages
Blackmar v. Guerre, 342 U.S. 512.....	13
Bugajewitz v. Adams, 228 U.S. 585.....	8
Cabebe v. Acheson, (9 Cir.) 183 F.2d 795.....	7, 10, 14
Calder v. Brill, 3 Dall. 386, 3 U.S. 386.....	8
Carlson v. Landon, 342 U.S. 524.....	9
Del Guercio v. Gabot, (9 Cir.) 161 F.2d 559.....	8, 14
Elk v. Wilkins, 112 U.S. 94	14
Eichenlaub v. Shaughnessy, 338 U.S. 521.....	8
Ganey v. United States, (8 Cir.) 149 F.2d 788.....	8, 14
Gonzales v. Barber, (9 Cir.) 207 F.2d 398.....	8, 14
Harisiades v. Shaughnessy, 342 U.S. 580.....	9
Heikkila v. Barber, 345 U.S. 229.....	4
Hooven & Allison Co. v. Evatt, 324 U.S. 652, 674-675.....	14
Jew Sing v. Barber, (9 Cir.) 215 F.2d 906.....	13
Jordan v. De George, 341 U.S. 223.....	8
Johannessen v. United States, 225 U.S. 227.....	8
Mahler v. Eby, 264 U.S. 32.....	9
McGrath v. Kristensen, 340 U.S. 162.....	13
Mangoang v. Boyd, (9 Cir.) 205 F.2d 553.....	7, 14
Matter of Coffee, 123 Cal. 522.....	8
People v. Cordero, 50 Cal.App.2d 146.....	14
Perkins v. Elg, 307 U.S. 325	13
Rubenstein v. Brownell, 206 F.2d 449.....	3
Schoeps v. Carmichael, (9 Cir.) 177 F.2d 391, cert. den. 339 U.S. 914	8
United States ex rel. Volpe v. Smith, 289 U.S. 422, 425....	8, 9
United States v. Zimmerman, (D.C.E.D.Pa.) 71 F.Supp. 534	8
Yanish v. Barber, (9 Cir.) 211 F.2d 467.....	3
Varleta v. Barber, (C.A. 9) 199 F.2d 419.....	10, 14

Constitutions

United States Constitution:	Pages
Article II, Section 2, Clause 2.....	13
Article VI, Clause 2.....	13
Fourteenth Amendment	14

Statutes

5 United States Code, Section 1009.....	3
28 United States Code:	
Section 1331	3
Section 1346(a) (2)	3
Section 2201	3, 13, 15
Jones Act, Section 2 (39 Stat. 545, 546).....	14
Immigration Act of 1902 (32 Stat. 691-692)	14
Immigration Act of 1917, Section 19 (8 U.S.C. 155).....	
.....	3, 4, 6, 7, 8, 10
Immigration Act of 1917 (39 Stat. 951, 953).....	14
Immigration Act of 1920 (8 U.S.C. Sec. 157).....	10
Immigration and Nationality Act of 1952:	
Section 242(c)	2
8 U.S.C. 1253(c).....	3
Section 405 (8 U.S.C. 1105).....	4
8 U.S.C. 155.....	5
8 U.S.C. 1252.....	5
Nationality Act of 1940:	
Section 101 (54 Stat. 1137)	15
8 U.S.C. 501.....	15
Philippine Independence Act of 1934, Section 8(a)(1) (48 Stat. 456 at 462).....	9
Treaty of Paris (30 Stat. 1754).....	13

Texts

Burdick, Law of the American Constitution (1922), pages 327-328	14
---	----

No. 14,053

IN THE
United States Court of Appeals
For the Ninth Circuit

BRIGILDO RESURRECCION-TALavera,
Appellant,

vs.

BRUCE G. BARBER, Individually and as
District Director of Immigration
and Naturalization,
Appellee.

APPELLEE'S REPLY BRIEF.

INTRODUCTORY STATEMENT.

The action in which appellant has noticed appeal was commenced below on August 24, 1953 by the filing of a complaint entitled "Complaint for Injunction, Declaratory Relief, and a Review of Administrative Action." The prayer of the complaint asked for a review of the legality of the deportation order, a declaration of the rights of the parties and for temporary and permanent injunction against deportation. A motion to dismiss was filed by the defendant on the ground, among others, that the complaint did not state a claim upon which relief could be granted. The Court below by memorandum and order dated

September 18, 1953 (Tr. p. 11) granted the motion and dismissed the action. The facts as alleged in the complaint stand as undisputed insofar as this appeal is concerned.

Following the order dismissing the action, a 48-hour temporary restraining order during which to make an application to the Court of Appeals for a stay of deportation pending appeal was, on September 21, 1953, granted by the Court below (Tr. 17). The notice of appeal was filed on September 23, 1953. (Tr. 18.)

On October 7, 1953 this Court denied appellant's motion for stay of deportation pending appeal. He was thereafter taken into custody and placed aboard the SS PRESIDENT WILSON for transportation to the Philippine Islands. On October 14, 1953 said vessel departed San Francisco and proceeded to San Pedro, California. Appellant caused to be filed a petition for writ of habeas corpus which was entertained by Chief Judge Denman of this Court, and on October 15, 1953 an order to show cause issued. Appellant was removed from the SS PRESIDENT WILSON at San Pedro, California on October 16, 1953 and returned to the custody of appellee in San Francisco. Hearing on the order to show cause and petition was had on October 21, 1953. On October 22, 1953 Judge Denman filed an opinion and order denying the application (Appendix A) but stayed deportation pending decision by this Court upon an application for a stay pending appeal. Application for such a stay was made and denied. On November

29, 1953 appellant was deported to the Philippine Islands. He has not reentered the United States.

JURISDICTION.

Appellant in his complaint alleged jurisdiction of the District Court under 28 U.S.C. §§1331, 1346(a)(2) and §2201, and 5 U.S.C. §1009. In his brief appellant was concerned with the matter only to the extent of stating—"The jurisdiction of the court below is conferred by 28 U.S.C. §§ 1331, 1346(a)(2), 2201, and 5 U.S.C. 1009."

The immigration proceedings herein were commenced in August, 1952 under the provisions of the Immigration Act of 1917, §19 (8 U.S.C. 155). The order of deportation became final on July 31, 1953. The Immigration and Nationality Act of 1952 became effective December 24, 1952 (Sec. 155 of Title 8 is now contained in Sec. 1251 of Title 8).

Appellant by his complaint sought a judicial review of the order of deportation prior to being taken into custody. For this purpose he proceeded similarly to *Rubenstein v. Brownell*, 206 F. 2d 449. However, in reliance on *Rubenstein v. Brownell*, resort must be had to Sec. 242(c) of the 1952 Act (8 U.S.C. 1253(c)) for jurisdiction and then according to the Second Circuit, the imminent detention may be tested only by the principles that would be applicable in habeas corpus.

In view of the savings clause of the 1952 Act, Sec. 405 (8 U.S.C. 1105 note) and *Yanish v. Barber*, 211 F. 2d 467 (9th Cir.) appellant might well contend, if it served his advantage, that the 1952 Act is not applicable as to him in that the proceedings were instituted under the 1917 Act. In that event *Heikkila v. Barber*, 345 U.S. 229, and *Heikkila v. Barber*, No. 13988 of this Court, are controlling and habeas corpus provides the sole judicial remedy.

Following the denial of a stay of deportation by this Court pending the appeal, appellant filed a petition for habeas corpus to review the legality of the deportation order. Chief Judge Denman of this Court issued an order to show cause and heard the matter at length. His opinion denying the writ is set forth in full (Appendix A). On motion to this Court a stay of deportation was again denied on appeal and appellant was deported. The appeal in the habeas corpus action, No. 14118, was dismissed as moot. This appeal is likewise *moot*.

STATUTES INVOLVED.

8 U.S.C. 155. Deportation of undesirable Aliens Generally.

“(a) That any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral

turpitude; * * * shall, upon the warrant of the Attorney General, be taken into custody and deported * * * . The provisions of this section, with the exceptions hereinbefore noted shall be applicable to the classes therein mentioned irrespective of the time of their entry into the United States; * * * .”

8 *U.S.C.* 1252

“(c) * * * the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien’s departure from the United States * * * .”

QUESTIONS PRESENTED.

Appellant designated the following points to be relied upon on appeal although the transcript of Record does not contain the designation.

1. “Appellant is not subject to deportation under the Immigration Act of 1917 because he was not an alien at the time of his conviction of a crime involving moral turpitude”;

2. “The Deportation Order is invalid and illegal in that it interprets the Immigration Act of 1917 as an ex post facto law forbidden by the Constitution of the United States.”

On page 10 of Appellant’s opening brief the following errors are specified:

“1. The Complaint states a cause of action”;

“2. Appellant is not an alien”;

“3. If Appellant is an alien he is not within the provisions of Section 19 of the 1917 Immigration Act since his conviction of a crime involving moral turpitude occurred while he was a national of the United States.”

Appellant has abandoned the second point in the designation of points and has substituted therefor the specification of error that he “is not an alien.” Upon this specification that “he is not an alien”, Appellant poses the following questions:

“1. Did Appellant become a citizen of the United States by birth in the Philippine Islands in 1910?”

“2. Did the Congress of the United States intend by the enactment of the Philippine Independence Act to apply the immigration and naturalization laws of the United States to Filipinos theretofore resident in the United States?”

“3. Did the grant of Philippine independence terminate appellant’s United States nationality?”

The third specification of error, the first designated point, and question 4 on page 2 of Appellant’s brief are the same.

Questions 5 and 6 relate to the review of a final Order of Deportation and of indispensable parties. As is shown on Page 16 of the transcript, these questions were not considered by the court below in dismissing the action.

ARGUMENT.**I.**

The following facts are alleged by appellant in his complaint.

Appellant was born in the Philippine Islands in 1910. He first came to the United States in March, 1934. In 1942 he was convicted of burglary in the first degree and served about two years in San Quentin. In 1952 he visited the town of Mexicali in Mexico and last returned to the United States in April, 1952. In August, 1952 he was arrested in an immigration deportation proceeding. On July 3, 1953 he was notified that the Board of Immigration Appeals had dismissed his appeal and that an order of deportation of February, 1953 had become final. He was ordered deported under the provisions of §19 of the Immigration Act of 1917 (8 U.S.C. 155). The material portion of which said statute provides:

“(a) * * * any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude . . . shall upon the warrant of the Attorney General, be taken into custody and deported.”

The court below granted defendant's motion to dismiss on the ground that there is stated no cause for granting any relief (Tr. 11-16). Judge Carter held:

(1) Appellant was an alien at the time of his entry into the United States in April, 1952, having acquired that status on July 4, 1946.

Mangoang v. Boyd, (9th Cir.) 205 F. 2d 553;

Cabebe v. Acheson, (9th Cir.) 183 F. 2d 795;

Gonzales v. Barber, (9th. Cir.) 207 F. 2d 398;
Gancy v. United States, (8th Cir.) 149 F. 2d
 788.

(2) Appellant made an entry in 1952 when he returned to the United States from Mexico.

United States ex rel. Volpe v. Smith, 289 U.S.
 422;

Schoeps v. Carmichael, (9th Cir.) 177 F. 2d
 391 cert. den. 339 U.S. 914;

Del Guercio v. Gabot, (9th Cir.) 161 F. 2d 559.

(3) Appellant had been convicted of a felony involving moral turpitude prior to his entry in 1952. He was convicted of burglary in the first degree in 1942.

Matter of Coffee, 123 Cal. 522;

United States ex rel. Volpe v. Smith, 289 U.S.
 422;

Jordan v. De George, 341 U.S. 223;

United States v. Zimmerman, (DCED Pa.) 71
 F. Supp. 534.

(4) There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.

Eichenlaub v. Shaughnessy, 338 U.S. 521.

(5) Section 19 of the Immigration Act of 1917 is not unconstitutional as an ex post facto law.

Calder v. Brill, 3 Dall. 386—3 U.S. 386;

Johannessen v. United States, 225 U.S. 227;

Bugajewitz v. Adams, 228 U.S. 585;

Carlson v. Landon, 342 U.S. 524;

Mahler v. Eby, 264 U.S. 32;

Harisiades v. Shaughnessy, 342 U.S. 580.

As previously stated, Appellant filed a notice of appeal and sought from this Court a stay of deportation pending appeal. The stay was denied and deportation was commenced. A petition for a writ of habeas corpus was filed and entertained by Chief Judge Denman of this Court (District Court No. 33118). After hearing the matter fully, Judge Denman, by order dated October 22, 1953, denied Appellant's application. (Appendix A.)

Appellant's contention herein, that he was not subject to deportation under the Immigration Act of 1917 because he was not an alien at the time of his conviction of a crime involving moral turpitude was also made by Appellant in the petition for writ of habeas corpus, presented to Judge Denman. In his opinion, (Appendix A) Judge Denman stated:

“ * * * for the purpose of determining whether the applicant is excludable or deportable he was an alien when convicted in 1942 * * * .”

Section 8(a)(1) of the Philippine Independence Act of 1934, 48 Stat. 456 at 462, provides that:

“For the purposes of the Immigration Act of 1917 * * * and all other laws of the United States relating to immigration, exclusion, or *expulsion* of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as aliens.”

The above section was an issue in *Gonzales v. Barber*, reported at 207 F. 2d 398, affirmed 347 U.S. 637. Gonzales, a Filipino, had committed two crimes, one in 1941 and one in 1950. He claimed he was not deportable because at the time he committed the crimes he was not an alien. This Court held that Gonzales was properly subject to deportation under Sec. 19 of the Immigration Act of 1917 as an alien if otherwise subject to its terms. See also

Cabebe v. Acheson, (CA-9) 183 F. 2d 795;

Varleta v. Barber, (CA-9) 199 F. 2d 419.

A similar contention was made to the Supreme Court of the United States in *Eichenlaub v. Shaughnessy*, (supra). In that case Eichenlaub, who had become a naturalized citizen of the United States in 1936, was in 1941 convicted of a conspiracy to violate the Espionage Act of 1917. His naturalization was subsequently revoked and thereafter deportation was sought under the Act of May 10, 1920 (8 U.S.C. §157). The Court considered the 1920 Act and the 1917 Act as *in pari materia* and applied the definition of the 1917 Act to the word "alien". (See footnote 13, page 528.)

"The above words require that all persons to be deported under this Act shall be 'aliens'. They do not limit its scope to aliens who have never been naturalized. They do not exempt those who have secured certificates of naturalization, but then lost them by court order on the ground of fraud in their procurement. They do not suggest that such persons are not as clearly 'aliens' as they were before their fraudulent naturaliza-

tion. *There is no question as to the power of Congress to enact a statute to deport aliens because of past misconduct.* That is what Congress did in the Act of 1920, and there was no occasion to restrict its language so as to narrow its plain meaning.” (Emphasis supplied.)

And at page 529:

“The one substantial issue is whether the Act requires that the relators not only must have been ‘aliens’ at the times when they were ordered deported, but that they must have also had that status at the times when they were convicted of designated offenses against the national security. The Government suggests that one route to a conclusion on this issue is to hold that the relators, as a matter of law, were ‘aliens’ when so convicted. The basis it suggests for so holding is that the judicial annulment of the relators’ naturalizations on the ground of fraud in their procurement deprived them of their naturalizations *ab initio*. *Rosenberg v. United States*, 60 F. 2d 475 (CA 3rd Cir.) They thus would be returned to their status as aliens as of the date of their respective naturalizations. Accordingly they would come within the scope of the Act of 1920, even if that Act were held to require that all offenders subject to deportation under it also must have had an *alien status when convicted* of the designated offenses.

“In our opinion, it is not necessary, for the purposes of these cases, to give a retroactive effect to the denaturalization orders. *A simpler and equally complete solution lies in the view that the Act does not require that the offenders*

reached by it must have had the status of aliens at the time they were convicted. As the Act does not state that necessity, it is applicable to all such offenders; including those denaturalized before or after their convictions as well as those who never have been naturalized. The convictions of the relators for designated offences are important conditions precedent to their being found to be undesirable residents. Their status as aliens is a necessary further condition of their deportability. When both conditions are met and, after hearing, the Attorney General finds them to be undesirable residents of the United States, the Act is satisfied.” (Emphasis ours.)

Appellant admits he made an entry from a foreign country in 1952 (See *U.S. ex rel. Volpe v. Smith*, 289 U.S. 422, 425) and admits that he was convicted of burglary in the first degree. It is submitted appellant was a deportable alien and he was so deported.

II.

Appellant has devoted the principal portion of his brief to the proposition that “appellant is not an alien.” This proposition was not advanced either to the Court below in this matter or to Judge Denman in the hearing on the habeas corpus petition.

In the present posture of this case, if the proposition were seriously considered, the nature of the action would necessarily be changed from a judicial re-

view of the immigration proceedings to a declaratory judgment action no longer involving the local immigration director. The affirmative relief sought is against the head of the department of the government concerned. The action would be under 28 USC 2201 and should be against the Attorney General of the United States, and as he is only subject to jurisdiction in the District of Columbia, suit would have to be filed in the District of Columbia.

Blackmar v. Guerre, 342 U.S. 512;

Jew Sing v. Barber, 215 F. 2d 906 (9 Cir.);

Perkins v. Elg, 307 U.S. 325;

McGrath v. Kristensen, 340 U.S. 162.

On page 11 of the brief appellant states that it is his contention that he became a citizen of the United States by birth *but* that he “does not claim that he is a citizen in the sense that he is entitled to all of the political rights of which a citizen may be possessed.”

The President of the United States has the power “by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur.” Const. Art. II, Sec. 2, Cl. 2.

The supreme law of the land consists of “This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, * * *”—Const. Art. VI, Cl. 2.

The Philippine Islands were ceded to the United States by the Treaty of Paris on December 10, 1898

(30 Stat. 1754) which provided in Article IX that "the civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." By the Act of July 1, 1902 (32 Stats. 691-692), Congress declared that all inhabitants of the Philippine Islands continuing to reside there who were Spanish subjects on April 11, 1899, and their children subsequently born, shall "be citizens of the Philippine Islands and as such entitled to the protection of the United States * * *." In 1916 in Section 2 of the Jones Act (39 Stat. 545, 546) this provision of the 1902 Act governing the political status of the inhabitants of the Philippine Islands was repeated. In contrast with the Act of March 2, 1917 (39 Stat. 951, 953) which declared the inhabitants of Puerto Rico to be citizens of the United States, no act of Congress has ever declared the citizens or inhabitants of the Philippine Islands to be citizens or inhabitants of the United States. Since the Philippine Islands were at no time incorporated into the United States, persons born in the Philippine Islands have not acquired United States citizenship by birth pursuant to the Fourteenth Amendment. *Cabebe v. Acheson*, (supra); *Gancy v. U.S.* (supra); *Mangoang v. Boyd*, (supra); *Gonzales v. Barber* (supra); *Del Guercio v. Gabot*, *Varleta v. Barber*, (supra); *Hooven & Allison Co. v. Evatt*, 324 U. S. 652, 674-675; *People v. Cordero*, 50 Cal. App. 2d 146; Cf. *Elk v. Wilkins*, 112 U.S. 94; Burdick, *Law of the American Constitution* (1922) pp. 327-328. Thus, the inhabitants of the Philippine

Islands, while admittedly not citizens of the United States, were entitled to the "protection of the United States" and owed "permanent allegiance" to the United States. This status became known as that of a "national" as distinguished from a "citizen" or a "non-citizen national." It was terminated for all purposes on July 4, 1946 when the Philippine Islands became an independent sovereignty. The distinction between "national" and "citizen" was written into Section 101 of the Nationality Act of 1940 (54 Stat. 1137, 8 U.S.C. 501).

CONCLUSION.

Appellee submits that the appeal herein is moot in that appellant has been deported to the Philippine Islands.

The attempt of appellant to convert the action from a judicial review of a final order of deportation into a declaratory judgment action under T. 28 U.S.C. § 2201 of the United States Code must fail for want of an indispensable party, the Attorney General of the United States or the Commissioner of Immigration. Appellant's contention that he is in a semi-status of citizenship by virtue of his birth in the Philippine Islands during the time that the United States of America asserted sovereign authority thereover is wholly unfounded. The Court below did not err in dismissing the action for failure to state a

claim upon which relief can be granted and the appeal should be dismissed as moot.

Dated: San Francisco, California,
February 17, 1955.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

Appendix A

Original Filed Oct. 22, 1953.

Clerk, U.S. Dist. Court
San Francisco.

*United States Court of Appeals
Ninth Circuit*

Before William Denman, Chief Judge

In the Matter of the Petition of
Brigildo Resurreccion-Talavera
for a Writ of Habeas Corpus.

} No. 33,118

DENMAN, Chief Judge:

Applicant, a national and citizen of the Philippine Republic, seeks from me, as Chief Judge, a writ of habeas corpus to free him from the custody of Bruce G. Barber, District Director, Immigration and Naturalization Service, who holds the applicant for the purpose of deporting him from the United States to that Republic pursuant to a duly issued order of deportation.

The application alleges that the applicant in 1942 was convicted in the Superior Court in and for the County of Monterey, State of California, of the crime of burglary in the first degree. He served a term of approximately two years in the California State Pris-

on at San Quentin. The application further alleges that in 1952, applicant voluntarily made several short trips over the Mexican border, returning to this country each time.

When applicant was convicted in 1942, it was the law that, because of the conviction, if he left the United States he could be excluded from re-entering, and that if he re-entered he could be deported. This law was established by the Immigration Act of 1917 and the Philippine Independence Act of 1934. The Philippine Independence Act of 1934, 48 Stat. 456, provides that: "For the purposes of the Immigration Act of 1917 . . . and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as aliens." § 8(a)(1), 48 Stat. at 462. Hence, for the purpose of determining whether the applicant is excludable or deportable, he was an alien when convicted in 1942. Among the classes of deportable aliens under the Immigration Act of 1917 is one who "at the time of entry was within one or more of the classes of aliens excludable by law at the time of entry." Former 8 U.S.C. § 155(a), now substantially re-enacted in 8 U.S.C. § 1251(a)(1). The classes of deportable aliens under that Act included those "who have been convicted of a crime involving moral turpitude . . ." prior to entry. A return by an alien from a voluntary trip to a foreign country, no matter how short the trip, is an entry. *Schoeps v. Carmichael*, 177 F. 2d 391 (Cir. 9). Being excludable

at the time of his re-entry, applicant is now properly held for deportation.

There is no merit to the contention of the applicant that his deportation is an ex post facto law addition to the penalty for the commission of the crime of burglary. The law as established by Congress prior to the commission of the crime contemplated that its commission could be the cause of exclusion or deportation.

The application is denied. The deportation order is stayed pending a decision by the Court of Appeals for the Ninth Circuit upon an application for a stay pending appeal in the within cause, provided such application is filed with the Court of Appeals within ten days after the date of this order.

William Denman,
Chief Judge.

No. 14077

**In the United States Court of Appeals
for the Ninth Circuit**

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

**THE MARTIN BROTHERS BOX COMPANY, A CORPORATION,
APPELLEE**

**REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION,
APPELLANT**

FILED

JUN -7 1954

**PAUL P. O'BRIEN
CLERK**



In the United States Court of Appeals for the Ninth Circuit

No. 14077

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

**THE MARTIN BROTHERS BOX COMPANY, A CORPORATION,
APPELLEE**

**REPLY BRIEF FOR INTERSTATE COMMERCE COMMISSION,
APPELLANT**

This reply brief is respectfully submitted in accordance with Rule 18, paragraph 4, of the Rules of the United States Court of Appeals for the Ninth Circuit. The time for filing such brief was extended by the Court to June 8, 1954.

In our reply brief we shall first deal with the critique of appellee contained in its brief, page 29 et seq., under the heading of "The Brief of Appellant, Interstate Commerce Commission."

In the first paragraph, page 29 of appellee's brief, it is stated that the Commission is a party to this case "not by virtue of any interest in the subject matter, but solely by virtue of statutory necessity." It refers to the fact that the United States, the statutory defendant, has not participated in the case, except to file an answer in the District Court, and then asserts that the Commission has become "an active

and biased advocate of the railroad.” The answer to this assertion is that the Commission is here defending its own order as it has the right to do. 28 U. S. C. Section 2323. In *United States v. Interstate Commerce Commission*, 337 U. S. 426, 432, the Supreme Court held that:

* * * The Interstate Commerce Act contains adequate provisions for protection of Commission orders by the Commission and by the railroads when, as here, they are the real parties in interest. For, whether the Attorney General defends or not, the Commission and the railroads are authorized to interpose all defenses * * *.

There is no basis for the statement that the Commission is “a biased advocate of the railroads” and we are surprised that appellee makes such a charge.

In subparagraphs (1) and (2), second paragraph, page 29 of appellee’s brief, reference is made to two “inaccurate” statements appearing in the Commission brief at pages 5 and 8, respectively. The first is that we have referred to the Commission’s order before this Court as the order “here under attack”. This statement was an inadvertence on our part and what we intended to say was “the order here under review.”

The second so-called inaccurate statement referred to by appellee, is that we have attempted to “twist legal conclusions of the Commission into findings of fact.” Appellee points to page 5 of the Commission’s brief where we have quoted verbatim the last paragraph of the Commission’s report (R. 126), and page 8 where we again refer to this paragraph. We sub-

mit that the final paragraph of the Commission's report is an ultimate finding based upon the evidence of record which is analyzed and discussed in the report. When the report is read it will be seen that the Commission made numerous subsidiary findings which support this ultimate finding.

It is true the Commission has stated conclusions of law in its report under the heading of "Conclusions", but it has also made factual conclusions and ultimate findings under the same heading. *Chicago, B. & Q. R. Co. v. United States*, 60 F. Supp. 580, 583. It is denied that any inaccurate statement in this matter has been made in the Commission's brief and we deny any attempt "to twist legal conclusions of the Commission into findings of fact."

On page 32 of its brief appellee asserts that the testimony referred to in the Commission's brief (p. 26), showing that the fluctuation in the movement of traffic out of appellee's plant ranged from as little as 17 cars a month to over 100 cars a month (R. 615), was corrected by the witness before leaving the witness stand. It is true the witness stated on cross-examination (R. 632-633) that he did not intend to say that in one month during the complaint period Martin Box Company shipped as few as 17 cars and that the 17 cars referred to applied to the month of April 1945, long before the complaint period. However, the witness made it clear that by his testimony on this point he was "trying to show the variations in their [appellee's] demand for cars even in periods when there was no car shortage. It still is true today." (R. 632-633) Our failure to include this

correction on cross-examination was due to an oversight. But this testimony as corrected is still of evidentiary significance as supporting the contention that there was fluctuation in the movement of traffic from appellee's plant during the complaint period.

In regard to appellee's denial (p. 32 of its brief) that its president did not admit there was a critical car shortage on the Southern Pacific during the complaint period, and that there was no shortage of cars on this railroad during such period (as contended in the Commission's brief, p. 28), it is submitted as to the first proposition that appellee's president did refer to "the Southern Pacific car shortage" (R. 177) and when interrogated as to what he meant by "car shortage" or "what period," he replied (R. 178), "The period that the Southern Pacific just didn't deliver cars" in 1946 and 1947. It is asserted by appellee that the witness was referring to his company's own shortage rather than to that of the railroad. However, we do not agree with this interpretation of the testimony.

Appellee's assertion that there was no car shortage on the Southern Pacific at any time during the complaint period is contrary to the evidence. See Exhibit 29, R. 796; Exhibit 12, R. 781; testimony of witnesses R. 451-452, 503-504, 555-556, 560-566, 616-618; see Commission's report R. 116-118. We submit that it is a matter of common knowledge to all shippers of freight by rail and to the public generally that there has been for the past several years a shortage of cars on practically every railroad throughout the entire country. Appellee certainly knew of this fact, since

it was a shipper of considerable tonnage. This lends credence to our belief that its president was referring to the railroad's shortage of cars and not its own in his testimony above discussed. The evidence of record showing a shortage of cars, particularly box cars used by appellee for its shipments of box crates, is substantial.

On page 33 of appellant's brief, it is asserted that the reference in the Commission's brief (p. 29) to demurrage rules and regulations impliedly suggests that appellee was charged demurrage by the railroad. The Commission's reference to demurrage clearly was not intended to imply that appellee was charged demurrage on any of the cars furnished it. The reference made was merely for the purpose of showing the reasonableness of the requirement for furnishing cars only on specific orders and in support of this the example of demurrage rules and regulations was cited. In such rules and regulations it is made clear that in the absence of specific and definite car orders, the demurrage tariffs would be wholly without meaning as demurrage does not accrue on an empty car that has not been placed on the shipper's tracks pursuant to such orders (R. 587). Rules Nos. 1 and 6 of B. T. Jones' Tariff No. 4-Y (ICC No. 3963) and No. 4-Z (ICC No. 4257).

It is asserted (p. 33 of appellee's brief) the Commission's statement that the record shows appellee was furnished all the cars for which it placed "specific orders" (p. 29 of the Commission's brief) was intended "to induce this Court to believe that no requests for cars were made by Martin which were

not recorded on a written order form either by an agent of the Southern Pacific or an employee of Martin." It is submitted that what we intended to say, and actually said, was that appellee was furnished all the cars for which definite and specific orders were placed, whether oral or written. However, it appears from the evidence that written orders were filed for all cars placed during the period involved. (R. 638-639). See pages 9, 11, post. We do not contend that there was any requirement, during the complaint period, that car orders must be in writing as a prerequisite to delivery.

Appellee next finds fault (p. 39 of its brief) with the Commission's reference to the testimony of Witness Nelson (p. 31 of the Commission's brief) showing that due to the car shortage situation the Southern Pacific had received numerous complaints from other shippers during the complaint period. It states that the Commission assigns no reason why the testimony of this witness, as to the car shortage situation, should have more evidentiary value than the testimony of another Southern Pacific witness in a different case before the Commission who had testified on April 30, 1947, as to the availability of cars (R. 791-792) that:

Well, the information that I am able to obtain right at the present time, particularly in the handling of lumber in the State of Oregon, there is no shortage of cars on Southern Pacific at the present time.

As to the testimony quoted above it will be noted that the witness was testifying as to conditions pre-

vailing on April 30, 1947,¹ and he made it plain that he was speaking “particularly” of lumber, which moves generally on open cars such as flat cars and gondolas, whereas appellee’s president stated (R. 209) that the cars required for his shipments of wire-bound boxes “had to be box cars,” which were water tight; also that box shooks had to be moved in the closed water-tight cars.²

Appellee’s main business was the manufacture of wire-bound boxes, box shooks, plywood and veneer (R. 192), none of which ordinarily moves in anything other than box cars. The shipment of lumber during the period in question was of minor importance to appellee in comparison with his principal business.

Lastly, appellee (p. 39 of its brief) challenges the statement made in the Commission’s brief (p. 32) that the record fails to show appellee was subjected to competition since it produced only boxes and was not engaged in the sale of lumber “as such”. Appellee contends this is in error since the record shows that during the period here involved it produced, sold and transported, considerable lumber.

In reply to this assertion it is submitted that the record shows that appellee’s entire enterprise is built around the box manufacturing business and that a considerable part of the shipments of its cut or sawn lumber during the period in question was to its plant

¹ The most critical period of car shortage on the Southern Pacific was the last six months of 1947. (R. 560, 565, 616).

² However, the witness stated that in a dry season he did accept a stock car for a movement of wire-bound boxes. (R. 209).

at Toledo, Ohio, to be used in manufacturing boxes. See Commission's report, R. 84, 85, 90, 424-425.

The gravamen of Martin Brothers Box Company's complaint before the Commission was with respect to its inability to secure sufficient cars for the shipment of wire-bound boxes, and cut and sawn lumber needed in this particular business.

No denial is here made of the fact that appellee is engaged in producing, transporting and selling some lumber as well as boxes but it is denied that the evidence of record shows that in regard to either lumber or wire-bound boxes that appellee was subjected to competition from others who received more favorable treatment in the matter of being furnished cars. Such a showing is required to establish undue preference, advantage, or prejudice before a violation of either Section 3 or Section 2 may be established. See *Tide Water Oil Co. v. Director General*, 62 I. C. C. 226, 227, and cases cited in our brief at p. 33. Appellee's failure to present such evidence was not the result of a lack of opportunity. The Commission's ultimate finding is (R. 126) that:

* * * complainant [appellee herein] has failed to establish that defendant [Southern Pacific] during the complaint period * * * subjected complainant to any undue prejudice in violation of section 3.

It is submitted that questions under Section 3 (1) of the Act are peculiarly within the province of the Commission. *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 304; *Barringer v. United States*, 319 U. S. 1, 11; *Chesapeake & Ohio Ry. Co. v. United*

States, 296 U. S. 187, 188; *Seaboard Air Line Ry. Co. v. United States*, 254 U. S. 57, 62, and cases cited therein. For the reasons stated above and those shown in Chapters II and III of our brief heretofore filed in this Court, the Commission was fully warranted in making the above finding.

As to whether or not the Southern Pacific failed in its duty to furnish reasonable car service to appellee in the period January 1 to September 30, 1947, it is submitted that the evidence of record, some of which has been referred to in Chapter II of the Commission's brief, shows that appellee received all the cars for which it placed specific and definite orders; that there was a car shortage of the type requested by appellee; that under the circumstances the distribution of cars among shippers (including appellee), made by the Southern Pacific, was just and reasonable; and that the treatment accorded appellee was equal to that accorded other shippers, who received no more cars than those for which definite orders had been placed.

It is further submitted that rail carriers should not be required to furnish cars to shippers requesting them except upon definite and specific orders. This is especially true in times of car shortage. The evidence shows that many requests of appellees for cars were indefinite and confusing as to the number actually needed (R. 609-610).

Appellee states at page 7 of its brief, under heading "Summary of Argument," that the examiner, the Commission and the Court all found that during the complaint period the Southern Pacific furnished all

shippers using its services, other than appellee "with from 80 to 100 percent" of their car requirements and that during such period appellee was furnished "less than 50 percent" desired and requested. That appellee is in error as to what the Commission found is shown by the following excerpt taken from its report (R. 118):

In support of its contention that cars were distributed to the complainant on a reasonable basis, the defendant showed that during the period concerned the complainant received more cars than it requested by written car orders, whereas other shippers on its lines, including the Portland division, were furnished on the average only 80 percent of the cars ordered by them. From January 1 to June 30, 1947, cars were furnished to the complainant in practically complete compliance with written car orders, and in the remainder of the period more cars than ordered were furnished, but some delay was encountered. In the latter period, the distribution of cars to shippers on the Portland division, including the complainant, was made on a percentage-of-quota basis; that is, if the available car supply on a particular day was only 50 percent of the aggregate capacity of the district, each shipper was assigned only 50 percent of its quota, except that no cars would be assigned to a shipper which had no orders on file. During the first 6 months of the complaint period, the car shortage was not as severe as during the later period; but some shortage did exist, and cars were allegedly distributed to each shipper in proportion to the number of empty cars available.

The Commission then describes in its report the practice of appellee in furnishing "written car orders," as follows (R. 119):

The complainant's practice with respect to furnishing written car orders was described by the Oakland local agent of the defendant. He testified that one of the complainant's employees made daily visits to his office and usually brought written car orders with him, but that he sometimes made out the orders at the office. He further testified, however, that it was the usual practice of this employee to first use the defendant's phone and call the defendant's office at Eugene, where most of the trains with empty cars for the complainant's plant originated, to find out how many cars had been assigned to the complainant that day and then place his order.

Under normal conditions it is the practice for shippers to order the specific number of cars wanted, and therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it had no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted

the cars that had been assigned to it for that day.

The Commission had found (R. 115) that evidence presented by a witness testifying for appellee "indicate[s] that cars approximately as ordered were promptly delivered to the complainant from January to June, inclusive, but that from July to September, inclusive, a considerable amount of delay in receiving cars was encountered." It then concluded and found (R. 124) that:

The evidence establishes that from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced; * * *.

The evidence on the record as a whole supports these findings and conclusions of the Commission. It, therefore, appears that instead of appellee receiving less than 50 percent of the cars for which it had placed definite and specific orders, that it received practically 100 percent of such cars.

CONCLUSION

For the reasons stated in our original brief as well as for those shown in this reply brief, we respectfully submit that the judgment of the District Court should be reversed, and the cause remanded with instructions that the Court below enter a judgment sustaining the Commission's order herein and that the cause be dismissed.

EDWARD M. REIDY,
Chief Counsel.

SAMUEL R. HOWELL,
Assistant Chief Counsel.

WILLIAM L. HARRISON,
Attorney.

In the
United States
Court of Appeals
For the Ninth Circuit

CYRIL MELVIN BERG,	<i>Appellant,</i>	} No. 14061
V.		
JOHN R. CRANOR, Superintendent of Washington State Penitentiary, at Walla Walla, Washington,	<i>Appellee.</i>	

APPEAL FROM THE JUDGMENT OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE.

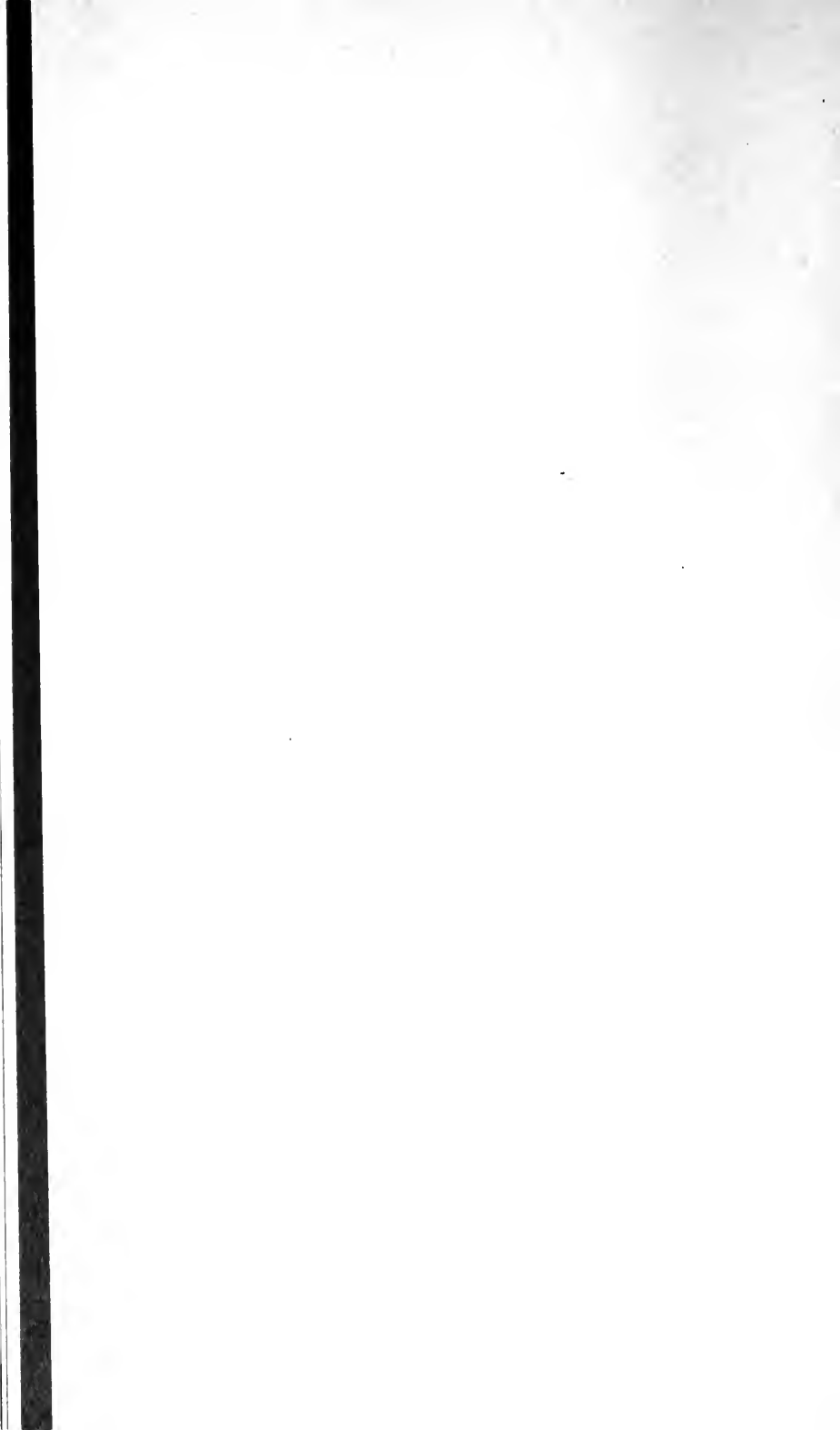
BRIEF OF APPELLEE

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,

Attorneys for Appellee.

Office and Post Office Address: Temple of Justice, Olympia, Wash.



INDEX

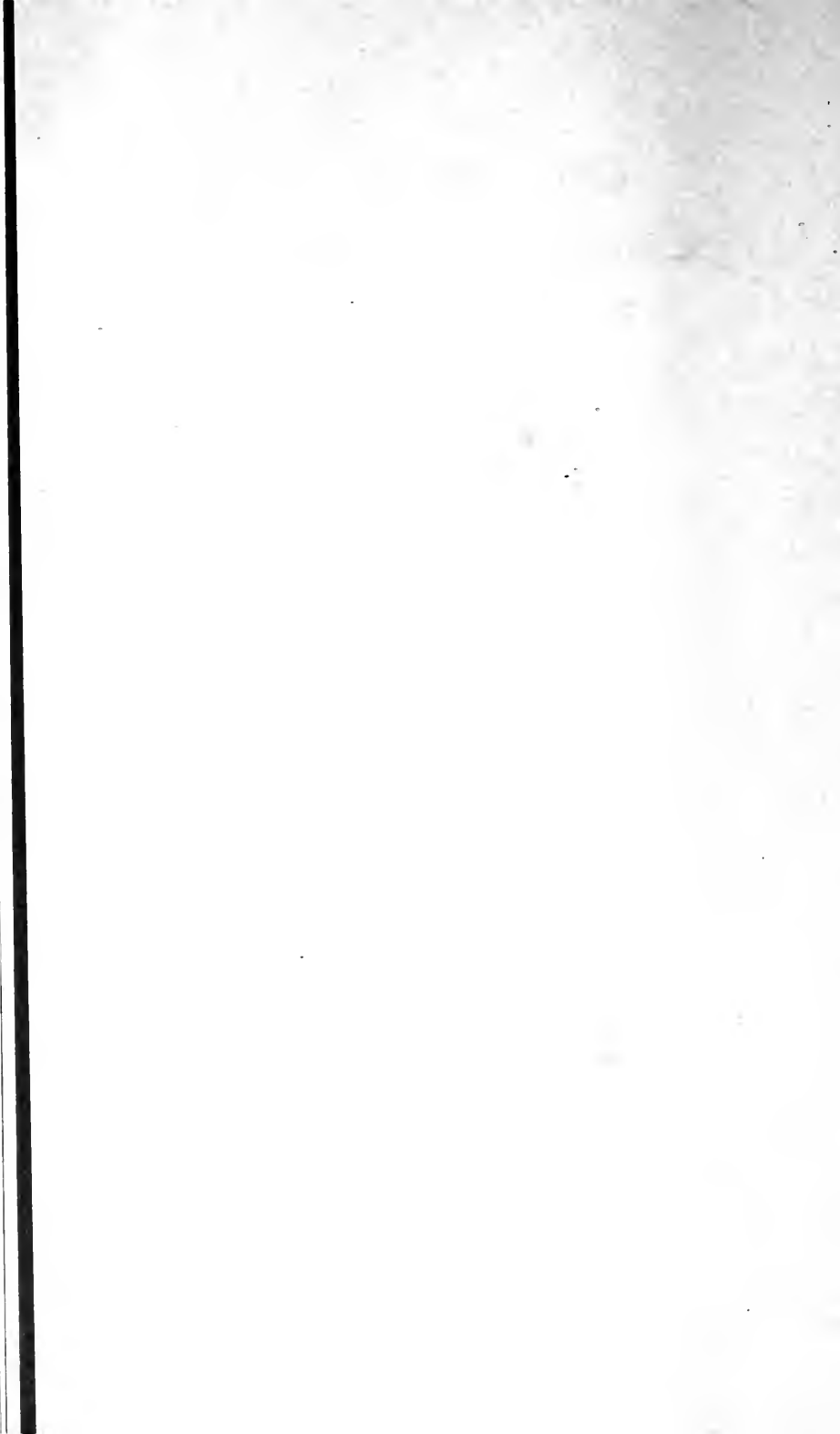
	<i>Page</i>
Additional Statement of the Case.....	5
Appellee's Statement of Questions Involved....	8
Argument	8
Conclusion	20

TABLE OF CASES

Dowd v. Cook, 340 U. S. 206.....	20
State of Washington v. Archie Brown, 26 Wn. (2d) 857, 176 P. (2d) 293.....	13, 16
State v. Berg, 35 Wn. (2d) 177, 211 P. (2d) 710	8, 12, 19

STATUTES

Rule 12(1) (a), 18 Wn. (2d) 14A.....	9, 13, 14
Rule 46, 34A Wn. (2d) 51.....	19



In the
United States
Court of Appeals
For the Ninth Circuit

CYRIL MELVIN BERG,	<i>Appellant,</i>	} No. 14061
v.		
JOHN R. CRANOR, Superintendent of Washington State Penitentiary, at Walla Walla, Washington,	<i>Appellee.</i>	

APPEAL FROM THE JUDGMENT OF THE DIS-
TRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF
WASHINGTON, SOUTHERN
DIVISION

HONORABLE SAMUEL M. DRIVER, JUDGE.

BRIEF OF APPELLEE

ADDITIONAL STATEMENT OF THE CASE

The appellant was charged by information in the superior court of the State of Washington for Chelan County with the crime of carnal knowledge of a female child, not his wife, under the age of eighteen, to-wit, age seventeen. He was subsequently tried

by the prosecuting attorney, Mr. James Arneil, before the Honorable Fred Kemp, Judge. The trial resulted in a hung jury. Then the prosecutor-elect having taken office, another trial was instituted which resulted on March 3, 1949, in conviction. The defense, a form of alibi, that is, petitioner's mind "went blank" during the pertinent period, was not believed by the jury. Following motions and argument on March 10, 1949, to vacate the judgment and for a new trial, the judgment and sentence was signed on March 17, 1951, by Judge Kemp. Immediately petitioner's new attorney, Mr. J. Edmund Quigley, gave oral notice of appeal which was noted in the clerk's records. The time within which petitioner had to file a statement of facts then began to run. Mr. Quigley later, and from Seattle, Wash., mailed a written notice of appeal which was received and filed March 21, 1949. Note here that it is not and was not contended the oral notice was for any reason invalid. Thus, the written notice had to be mere surplusage. In the correspondence between Mr. Quigley and Judge Kemp, Quigley requested Judge Kemp to "serve the prosecutor" with this useless document. The judge mislaid this document (the notice of appeal) on his desk and the result was that the written notice of appeal was never served on the prosecutor. The prosecuting attorney then, at the appropriate time, moved to dismiss the appeal in the Supreme Court of the State of Washington. Briefs and oral argument were heard and decision deferred until after the argument on the merits

which also included argument on the timeliness of filing. The appeal was dismissed. *State v. Berg*, 35 Wn. (2d) 177, 211 P. (2d) 710 (1949). Petitioner has had some three petitions for habeas corpus in the Supreme Court of the State of Washington and the present one heard in the district court and presently being appealed to this court.

The petitions are similar in every respect with only minor variations. The appellant in a calumnious petition is urging that Mr. J. A. Adams, trial counsel, was completely incompetent and actively conspired with the judge and with the prosecutor to secure petitioner's conviction. All this, despite the fact that Mr. Adams is a long respected member of the Washington State Bar Association, a former partner to the Honorable Sam Driver of the United States Federal District Court, and the present superior court judge of the State of Washington for Chelan County. Appellant has sought to prove his allegations of conspiracy by further alleging in his petition that Mr. Adams didn't try the case as petitioner would have tried it and has set out in great detail the methods and procedure that he, petitioner, would have used had he been trying the case himself.

The petitioner has also directly accused Judge Kemp and the prosecutor not only with joining in a conspiracy with Mr. Adams, but that the P. A. also knowingly used perjured witnesses at the second trial, which resulted in petitioner's conviction. In

support of these charges, the petitioner offered not one scintilla of factual proof in the district court.

The petitioner also alleges a denial of due process in that the State of Washington denied him the right to appeal. This, because the Supreme Court of the State of Washington dismissed the appeal upon motion of the prosecuting attorney because the statement of facts had not been filed within the ninety days allowed by the rules of our court.

APPELLEE'S STATEMENT OF QUESTIONS INVOLVED

There are two questions raised by appellant's petition: (1) Did J. A. Adams, Judge Kemp and Robert Conner, the prosecuting attorney, conspire together to gain appellant's conviction in the trial court? (2) Was appellant denied the right to appeal?

ARGUMENT

This matter has been fully examined by our supreme court in Cause No. 30975, *State v. Berg, supra*, both on the merits and on the motion to dismiss the appeal. Subsequently, it has been heard in three or four applications for writs of habeas corpus. In each of these actions the appellant's contentions have been found wanting and the petitions have been denied.

To begin with, oral notice of appeal was given on March 17, 1949. On this point there is absolutely

no argument. Rule 12(1)(a) entitled "Appeals in Criminal Cases" found in 18 Wn. (2d) 14-A, reads in part as follows:

"In criminal causes, in order to initiate an appeal, notice of appeal to the supreme court shall be given in open court at the time, or written notice of appeal shall be served upon the prevailing party and filed in the office of the clerk of the superior court within five days after the entry, of judgment or order from which the appeal is taken."

The time when the petitioner had to file his statement of facts began to run at the time of giving the oral notice of appeal. Later, Mr. Quigley mailed a written notice of appeal which was received and filed March 21, 1949. In his letter sent along with the notice was a request that Judge Kemp serve a copy on the prosecuting attorney. Again it is to be noted that at no time has there ever been a contention that the oral notice was for any reason invalid, rather the contention being, that the written notice was valid and therefore should be given effect although it was not served on the prosecuting attorney. The fact that the attorney for petitioner attempted to make Judge Kemp an errand boy, and failed, is used as a basis for the petitioner's allegation that he was discriminatorily denied the right to appeal. It might be assumed that this could be carried to an extreme and that oral notice of appeal could be given at the time of the signing of the judgment and sentence and then a written notice of appeal given on the thirtieth day and properly filed and served upon the respondent.

Would this, then, invalidate the oral notice of appeal or, as a matter of fact, are there two appeals granted in this state? Obviously, they are alternatives and if an election is made, then it is certainly to be assumed that the person making the election must stand upon it. In the instant case, counsel for petitioner at the time elected to give an oral notice of appeal. He cannot subsequently change his mind and give a written notice of appeal. Any such contention is sheer nonsense. Further, there is no authority, no duty nor any statute setting up a requirement that a judge, when requested by counsel, must act as an errand boy or server of papers for attorneys who appear before him. Further, the diligence of the petitioner's second attorney is further disclosed by the fact that on the ninetieth day, after oral notice of appeal (the 36th day after the written notice) he filed his praecipe with the Chelan County clerk demanding a transcript be prepared. This was done within two days but, of course, was too late.

During the proceedings had in the district court, from which this appeal is being prosecuted, Mr. Conner, the prosecuting attorney of Chelan County, and the man who prosecuted petitioner, upon cross-examination was asked if he had been served by Judge Kemp with the written notice of appeal. Mr. Conner emphatically denied that the papers were ever served on him. (Tr. 70-71.) To illustrate the position the petitioner is taking with regard to the service of the papers upon the prosecuting attorney the following

took place in the federal district court before Judge Driver:

"THE PETITIONER: Your Honor, if I may make a comment?

"THE COURT: Surely, go ahead.

"THE PETITIONER: Am I to be held responsible and sent to prison for such acts as the trial judge mislaying a paper, without an appeal? (Tr. 73.)

"BY THE PETITIONER:

"Q. Now, Mr. Conner, I wish to ask you one more question about this after I read this, and I want you to tell me and explain to this Court and these people in this courtroom whether the judge is lying or is he telling the truth.

"THE COURT: Beg your pardon, what was that question?

"THE PETITIONER: I want Mr. Conner to tell the Court whether the Honorable Judge Kemp was lying or whether he was telling the truth." (Tr. 74.)

The petitioner is insisting that the trial judge, when requested or told to do so, by counsel, must serve papers on a party to the contest. There is no suggestion of authority to sustain this proposition and that basically constitutes petitioner's case of denial of the right to appeal. The word of J. A. Adams, Judge Kemp, and Robert Conner, prosecuting attorney, as against the word of the petitioner is in issue. It is respectfully submitted that this man, a convicted criminal, is the first to question the honor, integrity and ability of the people named.

In the brief of appellant, he has stated the question as if this were an appeal from the dismissal by the Supreme Court of the State of Washington of his attempted appeal in 1949, in *Berg v. Cranor, supra*. Because of statements made by petitioner and because the opinion is short, it is set out herein *in toto*. It reads as follows:

“PER CURIAM.—[1] Appellant gave notice of appeal in open court on March 17, 1949, but the certified transcript of the record was not filed with either the supreme or the superior court until ninety-two days later; and, by the terms of Supreme Court Rule 12(3), no appeal in a criminal case is effectual unless such transcript is filed within ninety days after giving notice of appeal. *State v. Hampson*, 9 Wn. (2d) 278, 114 P. (2d) 992.

“Appellant also prepared a written notice of appeal, and it was filed on March 21, 1949, within five days after the entry of the judgment appealed from, but it was not served upon the prosecuting attorney. Rule 12(1)(a) provides that where a written notice of appeal is given in a criminal case it shall be served upon the prevailing party within five days after the entry of the judgment appealed from. Rule 12(3) provides that, if a notice of appeal is not given in the manner and within the time specified by Rule 12(1)(a), the appeal is not effectual.

“The appeal is dismissed.”

The rules set out in the opinion have been stated by our courts in many decisions to be jurisdictional. In other words, a failure to comply with these rules divests the court of jurisdiction to hear and decide a given case. It is also worthy of note, that assuming the written notice was a good notice, it was not served

upon the prosecuting attorney, which in itself is fatal. In fact, giving petitioner the benefit of the doubt, he failed to perfect either of his appeals.

During the course of the proceedings had in the district court, the appellant referred to *State of Washington v. Archie Brown*, 26 Wn. (2d) 857, 176 P. (2d) 293 (Tr. 86). In that case the prosecuting attorney, on October 13, 1945, filed an information against Archie Brown, Aaron Johnson and Willie Smith charging them with the crime of murder in the first degree in Count 1 and with the crime of robbery in Count 2. The defendants were Negroes. Trial of the three resulted in a verdict of guilty of first degree murder and the death penalty was recommended against the defendants, Archie Brown and Aaron Johnson. It was not recommended against Willie Smith. Judgment and sentence was entered and filed with the clerk of the superior court of Franklin County on November 29, 1945. Written notices of appeal were filed in behalf of the defendants Brown and Johnson on October 29, 1945. At the time judgment and sentence was imposed upon the defendants, the court entered an order directing that the statement of facts and briefs on appeal be paid for out of public funds. The appeals were docketed in the office of the clerk of the supreme court on January 4, 1946. A \$5.00 appearance fee was required to accompany the notice of appeal by the terms of Rule 12, then existing in the supreme court. These appearance fees were finally paid by the respective attorneys out of their own pockets on March 1, 1946, and March 4,

1946, respectively. Notice that the date of expiration of the ninety day period in which the appellants under Rule 12 were permitted to perfect their appeal, was February 27, 1946. Because of the jurisdictional requirement of the payment of the \$5.00 filing fee the clerk of the supreme court under Par. 7 of Rule 12 governing this procedure placed the case on the court's docket for automatic dismissal because of lack of jurisdiction resulting from failure of appellants' counsel to perfect their appeals within ninety days after the filing of notices of appeal. No notice is required to be given to any party when the cases on the dismissal docket are set by the clerk. The appeals were accordingly dismissed on March 22, 1946. The matter then came back to the court on a petition for a vacation of the order of dismissal of the appeals. Beginning at page 861 the court set out the following:

“Rule 12, paragraph (3), Rules of Supreme Court, 18 Wn. (2d) 14-a, (presently embodied in Rule 46, Washington Reports, 2nd Series, 34A) which governs the procedure on appeal in criminal cases, provides:

““(3) Strict conformance with the following requirements shall be necessary, and no appeal to the supreme court in a criminal cause shall be effectual unless:

““First, notice of appeal shall have been given in the manner and at the time specified in (1) (a) of this rule;

““Second, within ninety days after giving notice of appeal, appellant shall cause to be filed in the office of the clerk of the supreme court or of the clerk of the superior court:

“(a) The statement of facts or bill of exceptions, when it is necessary for a decision of the case on appeal, showing service on respondent and certified by the judge of the superior court: *Provided*, That the time for certification may be extended by the chief justice of the supreme court or, in his absence, by any judge of that court upon written application made within said ninety-day period and upon a showing that the necessity for additional time for the certification is not due to any lack of diligence on appellant’s part. If an extension be granted, the judge so granting it shall fix the time within which the statement of facts or bill of exceptions shall be certified and the time within which appellant’s opening brief shall be served and filed;

“(b) Transcript of record certified by the clerk of the superior court;

“(c) Appellant’s opening brief, prepared in accordance with the rules of the supreme court, with proof of service thereof on respondent, unless the time for service and filing be extended as provided in (3) (a) of this rule.

“Third, within ninety days after giving notice of appeal, the appellant shall deposit with the clerk of the supreme court five dollars as that clerk’s docket fee, if the appeal is taken by a defendant.’

“Paragraph (7) of Rule 12 provides:

“(7) If, upon the expiration of said ninety days after giving notice of appeal, the record is not made or fee not paid, all as required by this rule, the clerk of the supreme court shall forthwith, and without the necessity of any notice to appellant or his attorney of record, note the cause upon the calendar of the supreme court for the next motion day as being a cause subject to dismissal, and the supreme court shall dismiss the cause.’ ”

As pointed out by the court, these rules are jurisdictional and must be observed to the letter or the court does not acquire jurisdiction. While these rules are made by the court itself, it is to be observed that they operate equally on each and every individual coming before the court on appeal. However, in the instant case, *State v. Brown*, the court said at page 866,

“To summarize our views, as expressed herein, and in an endeavor to clarify those views for members of the bar, we wish to state that the sole reason for suspending the strict requirements of our Rule 12 in the instant case is that the appellants were sentenced to forfeit their lives in punishment for their crimes. We are of the opinion that capital cases should not be embraced within the rigid requirements of the rule. This idea is suggested by our Rule 28(2) which provides as follows:

“‘Service upon an attorney shall be made by delivering to him personally, or at his office by delivery to his clerk or to the person having charge thereof; or, if his office be not open, or there be no one in charge thereof, at his residence by delivery to some person of suitable age and discretion residing therein; or, if neither of the foregoing methods can be followed, by deposit in the post office to his address, with postage prepaid. *In capital causes, a motion to dismiss an appeal shall be served upon the defendant personally, as well as upon the attorney of record.*’ (Italics ours.)

“We wish to be clearly understood as holding that the rule announced and the language used herein are applicable only to cases in which the death penalty has been imposed.

“[3] We likewise hold that that section of Rule 12 which requires the payment of a five-dollar filing fee to the clerk of this court within

ninety days following the filing of notice of appeal, and further providing that the jurisdiction of this court to hear the appeal is conditioned upon the payment of such filing fee, has no application to cases appealed *in forma pauperis*. As applied to all other criminal appeals, Rule 12 stands, and no qualification or relaxation of its rigid requirements will be countenanced in cases other than capital cases and cases appealed *in forma pauperis*.

"The order of this court, entered March 22, 1946, dismissing the appellants' appeals, is vacated. The clerk of this court is directed to reinstate their appeals, and the appellants are ordered to serve and file their opening briefs with the clerk of this court within thirty days following the filing of this opinion."

There was a vigorous dissent in this case by Chief Justice Millard, concurred in by Judge Simpson. Judge Millard sets out the cases in which the very strict jurisdictional rule of our court has been many times decided. Some of these in the dissenting opinion and beginning at page 869, read as follows:

"In *State v. Conners*, 12 Wn. (2d) 128, 120 P. (2d) 1002, defendant appealed from conviction of crime of grand larceny. Every step in perfecting the appeal was timely and strictly conformed to the rules of this court except payment of required appearance fee of five dollars. Under the rules, the fee should have been paid on or before the sixtieth day after giving notice of appeal. As the clerk of this court did not receive the filing fee until the sixty-second day after notice of appeal was given, we dismissed the appeal. See, also, *State v. Nelson*, 6 Wn. (2d) 190, 107 P. (2d) 1113.

"In *State v. Hampson*, 9 Wn. (2d) 278, 114 P. (2d) 992, defendant was convicted of

the crime of murder in the first degree and sentenced to the penitentiary for life. Appellant was thirteen days late in filing an abstract of the record. On that ground, we dismissed his appeal.

"In *State v. Domanski*, 9 Wn. (2d) 519, 115 P. (2d) 729, defendant was convicted of being an habitual criminal and sentenced to life imprisonment. We held that his failure to follow the rule of this court requiring the setting out of instructions in the opening brief could not be excused. Although he filed on the day of the argument in this court a document setting out the challenged instructions, we refused to consider them.

"In *State v. Schafer*, 154 Wash. 322, 282 Pac. 55, appellant was found guilty of murder in the first degree and the death penalty exacted. We refused to relax the rule which then required filing of bill of exceptions or statement of facts within ninety-day period.

"In *State v. Hall*, 185 Wash. 685, 56 P. (2d) 715, defendant appealed from conviction of murder and death sentence. We held that appellant had not substantially complied with the rule that errors assigned but not argued in the brief would not be considered.

"In *State v. White*, 40 Wash. 428, 82 Pac. 743, defendant appealed from conviction of crime of murder in the first degree. Appellant was unable to secure within the time required by the rules a transcript by reason of his poverty. We dismissed the appeal and held that such right could be forfeited by reason of his poverty. See, also, *State v. Harder*, 130 Wash. 367, 227 Pac. 501."

The respondent has seen fit to set out this case and the cases cited therein for the reason that while the petitioner originally was not attacking the su-

preme court, in the appeal he has departed somewhat from his original contentions and based his attack upon the system of appeals in Washington. It is submitted that the arguments and authorities in the *Brown* case do not dispense with jurisdictional requirements but relaxes them only in the case of a crime in which capital punishment is to be imposed. As a matter of fact, one of the relaxed jurisdictional requirements set out in the *Brown* case has been formulated into a rule. In Washington Reports, Second Series, 34A, Rule 46, Appeals in Criminal Cases, subsection 6 at page 51, appears the following:

“Within ninety (90) days after the giving of notice of appeal, the appellant, if defendant (except in appeals prosecuted *in forma pauperis*), shall deposit with the clerk of the supreme court five dollars as that clerk’s docket fee.”

CONCLUSION

The right to appeal is embodied in our constitution and in our law. However, this right is personal to an accused and he is put to his burden to take advantage of his right as prescribed by the rules of our court. This is clearly discernible from the cases cited herein. If he does not take advantage of the opportunity given him according to the rules as they are clearly laid down, particularly when he has been represented by adequate counsel, in this case Mr. J. Edmund Quigley, then he has no cause to complain that he has been discriminatorily denied the right to appeal. Respondent freely admits that a discriminatory denial of the right to appeal would be good grounds for the issuance of a writ of habeas corpus. *Dowd v. Cook*, 340 U. S. 206. However, in that case the warden of the penitentiary, a state official of Indiana, actually and physically prevented the petitioner therein from sending his papers out of the prison so that at no time could he fulfill the requirements as required by the rules of court. Certainly, no such situation presented itself in the instant case. Petitioner had every opportunity, aided and abetted by counsel, to perfect his appeal. Counsel failed to do this. Surely petitioner cannot now be heard to complain.

Respectfully submitted,

DON EASTVOLD,
Attorney General,

CYRUS A. DIMMICK,
Assistant Attorney General,
Attorneys for Appellee.

No. 14,077

IN THE

United States
Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY, a
corporation,
Appellee.

Reply Brief for Appellant
Southern Pacific Company

JAMES C. DEZENDORF,

GEORGE B. CAMPBELL,

800 Pacific Building,
Portland 4, Oregon

JAMES E. LYONS,

CHARLES W. BURKETT, JR.,

65 Market Street,
San Francisco 5, California

Attorneys for Appellant

Southern Pacific Company

PARKER PRINTING COMPANY, 180 FIRST STREET, SAN FRANCISCO 5

FILED

JUN -4 1954

SUBJECT INDEX

	Page
I. Appellee's Brief Rests on a Misconception of the Powers and Duties of the Hearing Examiner, the Interstate Commerce Commission and the District Court.....	1
A. The relative functions and powers of the Commission and the District Court	3
B. The significance of the Examiner's report.....	8
II. It Is Undisputed and Conceded by All Parties That the Complaint Period Was a Time of General Car Shortage for Which Southern Pacific Was Not Legally Responsible	11
III. Appellee's Contention That Martin Brothers, as a Matter of Law, Made Reasonable Requests for More Cars Than It Was Furnished During the Complaint Period, Laeks Merit	14
(1) The general practice followed by shippers in ordering cars and by Southern Pacific in supplying cars....	15
(2) The practice followed by Martin Brothers in ordering cars during the complaint period.....	16
(3) The enforcement of car demurrage rules.....	18
(4) The practical factors of car distribution.....	18
(5) Previous decisions of the Interstate Commerce Commission	18
(6) Previous decisions of the courts.....	18
IV. Appellee's Own Evidence Before the Commission Showed That It Cancelled Car Orders During the Complaint Period	19
V. The Record Contains Substantial Evidence That Martin Brothers Held Box Cars, as Well as Other Types of Cars, for Three or More Days After They Had Been Placed on Its Spur Track at Oakland.....	20
Conclusion	22

TABLE OF AUTHORITIES

CASES	Page
Di Giorgio Importing & S. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425.....	18
Inter-City Transportation Co. v. United States, 89 F. Supp. 441	10
Johnston Seed Co. v. United States, 191 F.2d 228.....	6
Kenny v. United States, 103 F. Supp. 971.....	9
Koepp v. New Orleans G. N. R. Co., 162 La. 487, 110 So. 729....	18
Manufacturers Ry. Co. v. United States, 246 U.S. 457.....	8
Nashville Ry. v. Tennessee, 262 U.S. 318.....	5
National Labor Relations Bd. v. Tex-O-Kan F. Mills Co., 122 F.2d 433	10
Radio Commn. v. Nelson Bros. Co., 289 U.S. 266.....	10
Sample v. Atchison, T. & S. F. Ry. Co., 139 I.C.C. 324.....	18
Simmons v. Seaboard Air Line Ry., 133 Ga. 635, 66 S.E. 783....	18
Swayne & Hoyt, Ltd. v. United States, 300 U.S. 297.....	6
United States v. Chicago Heights Trucking Co., 310 U.S. 344....	6
Victor-American Fuel Co. v. Denver & S. L. R. Co., 115 I.C.C. 169	18
Virginian Ry. Co. v. United States, 272 U.S. 658.....	5
Winter's Metallic Paint Co. v. Chicago, M., St. P. & P. Ry. Co., 87 I.C.C. 113	18
Woolley Co. v. Southern Ry. Co., 96 I.C.C. 161.....	18
<hr/>	
Administrative Procedure Act.....	9
42 Am. Jur., Sec. 145.....	10
I. C. C. General Rules of Practice.....	9
5 U.S.C., Sec. 1007 (a).....	9

IN THE

United States
Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY, a
corporation,
Appellee.

Reply Brief for Appellant
Southern Pacific Company

I.

**APPELLEE'S BRIEF RESTS ON A MISCONCEPTION OF THE
POWERS AND DUTIES OF THE HEARING EXAMINER, THE
INTERSTATE COMMERCE COMMISSION AND THE DIS-
TRICT COURT**

Appellee¹ in its brief makes frequent reference to statements made in the proposed report of the hearing Examiner, in the report and order of the Interstate Commerce

1. Referred to herein as appellee and as Martin Brothers; appellant Interstate Commerce Commission and appellant Southern Pacific Company are generally referred to as "the Commission" and "Southern Pacific", respectively.

Commission, and in the opinion and judgment of the District Court. The ultimate determinations made in these three documents were the following:

1. The Examiner in his proposed report recommended that the Commission *should find* that during the complaint period Southern Pacific failed in its duty to provide and furnish transportation from the Martin Brothers' plant upon reasonable request, and failed in its duty to furnish adequate car service at that plant to a specified extent. The Examiner recommended that the Commission should further find that Martin Brothers had been damaged and was entitled to reparation.²

2. The Commission in its report found that Martin Brothers had failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice as alleged, in violation of Section 1 of the Interstate Commerce Act, in furnishing or not furnishing cars to Martin Brothers, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3. The Commission gave effect to these determinations by contemporaneously issuing an order "that the complaint in this proceeding be, and it is hereby, dismissed".

3. The District Court in its opinion and judgment determined as a matter of law that the Commission was required to find, on the record as made, that Southern

2. These findings proposed by the Examiner were in response to the allegation in the complaint of the violation of Section 1 of the Interstate Commerce Act, which requires rail carriers to furnish rail cars "upon reasonable request". The Examiner's proposed report contained no recommendation that the Commission find that Southern Pacific had subjected Martin Brothers to any undue prejudice in contravention of Section 3 of the Act, as alleged in the complaint.

Pacific had violated Section 1 and Section 3 and that Martin Brothers was entitled to an award of reparation.

Appellee attempts to give a correlative status to these three determinations and emphasizes the alleged fact that the Examiner and the District Court "made the same findings and reached the same conclusions of law". This reflects a misconception by appellee of the powers and duties of the hearing Examiner, the Commission, and the District Court in the administrative process.

In demonstrating that misconception we shall consider first the relative functions and powers of the Commission and the District Court and then the significance of the Examiner's report.

A. The relative functions and powers of the Commission and the District Court

While this is an appeal from the judgment of a district court, that court, in entering such judgment, was acting only in the capacity of reviewing a report and order of the Interstate Commerce Commission. The sole evidence received by the District Court was the record made before the Commission, and even in reviewing that record the function of the District Court was not to provide a trial *de novo*, in any sense, of the issues determined by the Commission. The District Court's function was, rather, to determine, as a matter of law, whether the record made before the Commission contained substantial evidence to support the Commission's findings. Therefore, unlike most appeals from district courts to this court, there are no findings of fact of the trial judge to be given controlling weight. As the sole

determinations made by the trial judge in his function are matters of law, this court has the same power in considering and making those determinations as did the trial judge.

In apparent recognition that the power of the District Court was limited to determining matters of law, appellee reiterates throughout its brief the contention that the issues of whether Southern Pacific failed to provide Martin Brothers with cars upon reasonable request, in violation of Section 1, and subjected Martin Brothers to undue prejudice in violation of Section 3, are questions of law which may be determined by the District Court in a manner different than they were determined by the Commission. For example, at page 29 appellee, after quoting a statement from the brief of appellant Interstate Commerce Commission, alleges:

“The statement describes the conclusions of the Commission as ‘ultimate finding’ (p. 5 and 8), thus adopting the device used by the appellant, Southern Pacific Company, of attempting to twist legal conclusions of the Commission into findings of fact.”

This doctrine advocated by appellee is erroneous. We know of no decision in which a court has ever held that a particular factual record as made before the Interstate Commerce Commission compelled the Commission to conclude as a matter of law that assailed action of a carrier was unreasonable, in violation of Section 1, or constituted undue prejudice, in violation of Section 3. Nor does appellee cite any such decision. Contrariwise, the United States Supreme Court has consistently held that whether particular rates, regulations or practices are (1) “reasonable” or (2) “unduly prejudicial” are determinations of fact confided by Congress to the exclusive judgment and discretion of

the Interstate Commerce Commission. The sound reason for this principle is that neither Section 1 nor Section 3 contains any definition of what is reasonable or unreasonable or what constitutes an undue prejudice, and the Interstate Commerce Commission is a tribunal created by law and informed by experience to determine these questions. The following quotations illustrate the promulgation and application of the principle and the supporting reason by the Supreme Court.

“The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal ‘informed by experience’. *Illinois Central R. R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454.”

Virginian Ry. Co. v. United States (1926), 272 U.S. 658, 665-666.

“Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, *as a question of fact*, on the matters proved in the particular case. *Interstate Commerce Commission v. Alabama Midland Ry. Co.*, 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic.” (Emphasis supplied.)

Nashville Ry. v. Tennessee (1923), 262 U.S. 318, 322.

“The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when ‘undue’, ‘unjust’, ‘unfair’, and ‘unreason-

able'. And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination."

United States v. Chicago Heights Trucking Co.
(1940), 310 U.S. 344, 352-353.

"Whether a discrimination in rates or services of a carrier is undue or unreasonable has always been regarded as peculiarly a question committed to the judgment of the administrative body, based upon an appreciation of all the facts and circumstances affecting the traffic. [Citing cases]."

Swayne & Hoyt, Ltd. v. United States (1937), 300 U.S. 297, 304.

Consistent with these expressions of principle by the Supreme Court is the following statement of the Court of Appeals for the Tenth Circuit in *Johnston Seed Co. v. United States*, (C.A. 10, 1951), 191 F.2d 228, in which the court upheld a decision of the Interstate Commerce Commission denying an award of reparation on the ground that the identical facts constituted a violation of Section 1 for the future *but not for the past* (p. 231):

"Complaint is made that the findings of the Commission were directly contrary to the evidence, and were arbitrary and capricious. The argument in support of the contention is that the finding that the rates charged on mung beans were not shown to have been unreasonable is contrary to the evidence. In view of the dissimilarity among cases of this kind involving reparation, no good purpose would be served by detailing the evidence at length. *The finding was in the nature of a*

factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission. We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to substitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. The field for exertion of the judicial function is exhausted when it appears that there was rational basis for the intelligent finding or conclusion of the Commission. [Citing cases.]” (Emphasis supplied.)

Notwithstanding its having been so well settled that findings as to whether reasonableness and undue prejudice exist are *factual* questions within the exclusive jurisdiction of a tribunal “informed by experience”, appellee in its brief refers repeatedly to “findings” of the District Court and the conclusion of the District Court that Martin Brothers was entitled to damages. For example, appellee at page 22 quotes with approval the following statement by the District Court:

“I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed or requested by the plaintiff *and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.*” (R. 65) (Emphasis supplied.)

This quotation brings into striking perspective the fact that the District Court made *a determination of its own* that

Martin Brothers made requests, *which were in fact reasonable*, for more cars than it received during the complaint period, upon which determination appellee now relies.

This action of the District Court, regardless of the technical words by which it may be described by appellee in its brief, constitutes nothing other than a weighing of the evidence. The Supreme Court specifically condemned such a weighing of the evidence in a judicial review of Commission decisions as follows in *Manufacturers Ry. Co. v. United States* (1918), 246 U.S. 457, 482:

“In the present case the negative finding of the Commission upon the question of undue discrimination was based upon a consideration of the different conditions of location, ownership, and operation as between the Railway and the Terminal. 28 I.C.C. 104, 105; 32 I.C.C. 102. The conclusions were reached after full hearing, are not without support in the evidence, and we are unable to say that they show an abuse of discretion. It may be conceded that the evidence would have warranted a different finding; indeed the first report of the Commission was to the contrary; but to annul the Commission’s order on this ground would be to substitute the judgment of a court for the judgment of the Commission upon a matter purely administrative, and this can not be done. [Cases cited.]”

B. The significance of the Examiner's report

Appellee in its brief repeatedly refers to the Examiner’s proposed findings as constituting “findings of fact” and “conclusions” determining the issues presented in its complaint to the Commission; appellee intimates that the Examiner made a judicial determination and that the Commission in turn performed the function of merely reviewing that

determination. But this is not the case. The Examiner in the present case pretended to exercise no judicial powers separate and apart from those of the Commission, and he possessed no such powers. The Examiner in his proposed report made no findings of fact; he merely recommended to the Commission that the Commission should make certain findings of fact.

The very purpose of the Examiner's proposed report is to give the parties the opportunity of pointing out to the Commission (through the presentation of exceptions and oral argument) errors in the recommendation of its subordinate employee, the Examiner—this process providing a maximum guaranty of due process.³ And in the present case, in which the Examiner recommended that the Commission *should find* that Southern Pacific had failed in its duties under Section 1 and *should find* that Martin Brothers had been damaged and was entitled to reparation, Southern Pacific submitted extensive exceptions and presented oral argument before the individual commissioners in Washington, in which it demonstrated, for reasons of fact, law and policy, that the Examiner was wrong in his recommendations (R. 656). It was only after those presentations that Commission action was taken: the issuance of the report of Division 3 by a vote of 3 to 0, which represented the ultimate findings of the Commission, and the issuance of the Commission's order dismissing the complaint; and the action of the entire Commission in denying Martin Brothers' petition for reconsideration by a vote of 10 to 0.

3. The Examiner's report, although provided for in the Commission's General Rules of Practice and the Administrative Procedure Act, is not mandatory in all cases. *Kenny v. United States* (U.S.D.C., D.N.J., 1952), 103 F. Supp. 971, 977; 5 U.S.C., Sec. 1007(a).

That our concept of the Examiner's proposed report is correct is evidenced by the following holding of the United States Supreme Court in *Radio Commn. v. Nelson Bros. Co.* (1933), 289 U.S. 266, 285-286:

"Complaint is also made that the Commission did not adopt the recommendations of its examiner. But the Commission had the responsibility of decision and was not only at liberty but was required to reach its own conclusions upon the evidence."

While this holding of the court pertained to action of the Federal Radio Commission, the same principle has been recognized with respect to the Interstate Commerce Commission. *Inter-City Transportation Co. v. United States* (U.S.D.C., D.N.J., 1948), 89 F. Supp. 441. In that case a party assailed a decision of the Interstate Commerce Commission which was contrary to the recommended decision of the hearing examiner, and the court cited *Radio Commn. v. Nelson Bros. Co.* in support of its following holding (p. 445):

"it is the responsibility of the Commission and * * * the Commission has the duty in a proper case of disagreeing with a joint board or one of its own examiners, without any attachment of legal significance thereto."

See, also, *National Labor Relations Bd. v. Tex-O-Kan F. Mills Co.* (C.A. 5, 1941), 122 F.2d 433, 437; 42 *Am. Jur.*, Sec. 145.

IT IS UNDISPUTED AND CONCEDED BY ALL PARTIES THAT THE COMPLAINT PERIOD WAS A TIME OF GENERAL CAR SHORTAGE FOR WHICH SOUTHERN PACIFIC WAS NOT LEGALLY RESPONSIBLE

Many of the arguments presented in appellee's brief⁴ are answered by the fact, undisputed and conceded by all parties, that the period from January 1 to September 30, 1947, to which appellee's complaint before the Commission was directed, was a period of general freight-car shortage, for which Southern Pacific was not responsible. Indeed, the original complaint of Martin Brothers, as filed with the Commission, specifically stated that during this period there was "a general shortage of box cars" (R. 78). And the Commission in its report stated:

"After the close of World War II, the nation as a whole experienced a great industrial development, and during 1947 the nation's railroads experienced, for the first time since 1920, except in the war period, an average daily shortage of cars. * * * During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.

"In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest prod-

4. For example, appellee states at page 22:

"The next matter for consideration is whether during the complaint period Southern Pacific supplied to Martin *an adequate supply of box cars* for transportation of Martin's products in interstate commerce." (Emphasis supplied.)

ucts traffic. * * * The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.

“Another factor affecting the defendant’s car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and postwar periods it exerted extensive efforts to conserve and increase its facilities. *On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint.*” (Emphasis supplied.) (R. 116-118)

The identical statements were originally made by the Examiner in his proposed report, and yet no exceptions or objections to these statements were ever registered by Martin Brothers, either in its exceptions before the Commission, in its petition for reconsideration before the Commission, or in the proceedings before the District Court. And the District Court in its opinion accepts the italicized statement in the above quotation, appellee even conceding in its brief (p. 44):

“The next conclusion of the Commission is that during 1947 there was in general a shortage of freight cars, and the Court commented that the evidence upon which this conclusion was based supported the conclusion.”

During this car shortage period Southern Pacific did everything possible to insure a distribution to each of the

hundreds of shippers on its lines in Oregon of *a fair share* of the limited car supply available, and during the nine-month complaint period actually furnished Martin Brothers some 565 cars (R. 748-759).

It is to be expected that any method of distribution of a rail carrier's available car supply during a car-shortage period would result in the carrier receiving continual complaints from shippers that they were not receiving sufficient cars. And the record shows that during the complaint period Southern Pacific received thousands of such complaints. Witness F. C. Nelson, Freight Traffic Manager for Southern Pacific at Portland, testified (R. 616) :

“Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?

A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem,

Eugene, Medford, were also receiving complaints in countless numbers."

Yet during such a general period of car shortage the conduct of Martin Brothers was not of a kind to aid in mitigating the difficulties confronting a carrier and its shippers. Martin Brothers made general and conflicting statements as to its requirements: it inexplicably refrained from making specific requests for the additional cars now claimed to have been required through the use of car orders, although admonished to do so, and it cancelled specific car orders and failed to use promptly the cars which were supplied to it. All of these facts were shown in the record before the Commission and are developed in our opening brief. These facts certainly constitute "substantial evidence" to support the Commission's ultimate findings that Martin Brothers failed to establish that Southern Pacific "engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the Act, in furnishing or not furnishing cars" or subjected Martin Brothers "to any undue prejudice in violation of Section 3."

III.

APPELLEE'S CONTENTION THAT MARTIN BROTHERS, AS A MATTER OF LAW, MADE REASONABLE REQUESTS FOR MORE CARS THAN IT WAS FURNISHED DURING THE COMPLAINT PERIOD, LACKS MERIT

At pages 16 to 22 of its brief, appellee advances the contention that certain acts of Martin Brothers constituted "reasonable" requests, *as a matter of law*, for more cars than it was furnished during the complaint period and are such as to have compelled the Commission to conclude that Southern Pacific violated Sections 1 and 3 of the Interstate

Commerce Act as alleged. Our reply to this contention of appellee is (1) that the determination as to whether requests for cars are or are not "reasonable" is not a question of law but is rather a question of fact (see authorities cited *supra*, pp. 5-7), and (2) that the record contains substantial evidence that Martin Brothers, as a matter of fact, made no "reasonable" requests for the furnishing of more cars than it actually received during the nine-month complaint period. The existence of this substantial evidence was demonstrated in our opening brief by reference to six criteria of a "reasonable" request, all of which established that, to be reasonable, requests for cars by Martin Brothers should have been sufficiently specific to reveal to Southern Pacific the number and type of cars desired on a particular day. A list of these six criteria, with such discussion as appears necessary to meet criticisms of the criteria, presented by appellee in its brief, follows:

- (1) *The general practice followed by shippers in ordering cars, and by Southern Pacific in supplying cars.*

It was not the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. During the complaint period the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only upon receiving an "order" for the placing of a definite number and type of cars on a particular day. Martin Brothers, in its own exhibits, showed that six other Oregon lumber shippers as well as Martin Brothers itself received only cars for which they had placed specific car

orders (R. 704-759). It was the practice of shippers to place their specific day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590).⁵

(2) *The practice followed by Martin Brothers in ordering cars during the complaint period.*

Martin Brothers followed the same general practice in ordering the 565 cars which it received during the complaint period as did other shippers. Yet appellee states, at page 34 of its brief, that cars were furnished to Martin Brothers during the complaint period "without any reference whatsoever to the so-called specific order forms". This contention is completely answered by complainant's own Exhibit No. 8 (R. 748), prepared and presented by Martin Brothers' witness Forrest (R. 312). In that exhibit Martin Brothers shows that the cars it did receive during the complaint period were received pursuant to the specific orders which it placed, either in writing or orally by telephone. To illustrate, the following is a reproduction of the first five lines of page 1 of Exhibit No. 8 (R. 748) :

5. This general practice followed by other shippers in ordering cars and by Southern Pacific in supplying cars to them, in addition to providing a persuasive criterion of a "reasonable request", reveals conclusively the absence of any undue prejudice in violation of Section 3, as alleged by Martin Brothers. Since Southern Pacific furnished other shippers no more cars than those for which they placed specific car orders, and furnished Martin Brothers with all the cars for which they placed specific car orders during the complaint period, other shippers received no more favorable treatment than did Martin Brothers.

No. of Cars Ordered	Date Ordered	Date Wanted	Cars Received		
			No.	Date	
1	1/2	1/4	1	1/4	Signed
2	1/2	1/4	2	1/4	Signed
3	1/2	1/4	3	1/4	Signed
2	1/2	1/6	2	1/6	Signed
1	1/2	1/6	1	1/6	Signed

The balance of the exhibit is of the same character.

In its brief, appellee quotes certain testimony by witness Bogan as indicating that Martin Brothers did not place specific car orders until after it had determined what cars would be available (p. 34). Any such indication is in direct conflict with the showing made by appellee in its own Exhibit No. 8. Appellee there shows that it generally placed specific orders for cars two or more days prior to the time it "wanted" the cars (and two or more days prior to the time the cars were actually received). Moreover, immediately preceding the excerpt from the testimony of witness Bogan quoted by appellee, Mr. Bogan testified (R. 638):

"Q. [By Mr. Shafer] Did you know when you got the orders [from Martin Brothers' employee Stapleton] what cars you would give him?

A. When I got the order from Stapleton?

Q. Yes.

A. No. I wouldn't know that until, as a rule, until the train gets in that would have the cars."

At page 35 of its brief, appellee argues that Southern Pacific's witness Robinson testified that he "allocated" cars ordered to cars actually furnished "after the complaint in this matter had been filed with the Commission", and quotes from certain testimony presented by Mr. Robinson at page 574 of the record. The allocation of cars there referred to

by Mr. Robinson was of refrigerator cars to box cars as authorized by I.C.C. Service Order 558 (Ex. No. 34; R. 798) and was designed merely to show that the cars actually furnished constituted a complete fulfillment of the individual car orders placed by Martin Brothers.

(3) *The enforcement of car demurrage rules.*

See pages 19 to 21 of our opening brief.

(4) *The practical factors of car distribution.*

See pages 21 to 24 of our opening brief.

(5) *Previous decisions of the Interstate Commerce Commission.*

Previous decisions of the Commission in *Woolley Co. v. Southern Ry. Co.* (1925), 96 I.C.C. 161, *Winter's Metallic Paint Co. v. Chicago, M., St. P. & P. Ry. Co.* (1923), 87 I.C.C. 113, *Sample v. Atchison, T. & S. F. Ry. Co.* (1928), 139 I.C.C. 324, and *Victor-American Fuel Co. v. Denver & S. L. R. Co.* (1926), 115 I.C.C. 169, are discussed in detail at pages 30 to 33 of our opening brief.

(6) *Previous decisions of the courts.*

Previous decisions of courts in *Koepp v. New Orleans G. N. R. Co.* (1926), 162 La. 487, 110 So. 729, *Simmons v. Seaboard Air Line Ry.* (1909), 133 Ga. 635, 66 S.E. 783, and *Di Giorgio Importing & S. Co. v. Pennsylvania R. Co.* (1906), 104 Md. 693, 65 Atl. 425, are discussed in detail at pages 25 to 29 of our opening brief.

When measured by these six criteria, it is readily apparent that the evidence set forth by appellee in the six subparagraphs at pages 16 to 20 of its brief, as allegedly

constituting “reasonable” requests for additional cars, were not such, either in law or in fact. None of the conduct there set forth constituted specific day-to-day requests for a definite number and type of cars on a particular day, as is required by the six criteria of a “reasonable” request. This is demonstrated at pages 34 to 37 of our opening brief.

IV.

**APPELLEE'S OWN EVIDENCE BEFORE THE COMMISSION
SHOWED THAT IT CANCELLED CAR ORDERS DURING THE
COMPLAINT PERIOD**

In our opening brief (pp. 50-51) we pointed out that the record shows that Martin Brothers cancelled certain of the specific car orders placed by it during the complaint period. Appellee answers this contention in its brief (p. 45) by stating: "There is no evidence in the record that Martin at any time cancelled any car order * * *." But this bland statement cannot erase from the record the showing presented in Martin Brothers own Exhibit No. 8 (R. 748-759), prepared and presented by Martin Brothers' witness Forrest (R. 315). That showing, as taken literally from the face of that Exhibit No. 8 is the following:

Order of Feb. 19, 1947, for 3 cars wanted Feb. 22, 1947, "cancelled"
 Order of Feb. 26, 1947, for 2 cars wanted Mar. 1, 1947, "cancelled"
 Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
 Order of Feb. 26, 1947, for 1 car wanted Mar. 1, 1947, "cancelled"
 Order of Apr. 14, 1947, for 2 cars wanted Apr. 16, 1947, "cancelled
 for one car"
 Order of Apr. 14, 1947, for 1 car wanted Apr. 17, 1947, "cancelled"
 Order of June 30, 1947, for 1 car wanted June 30, 1947, "cancelled"
 Order of July 2, 1947, for 1 car wanted July 7, 1947, "cancelled"
 Order of July 11, 1947, for 1 car wanted July 16, 1947, "cancelled"

Nor did witness Forrest, in presenting Exhibit No. 8, attempt to either qualify or explain the cancellations so shown in his exhibit.

- Appellee in its brief also attempts to refute this clear evidence of cancellation of orders by referring to the testimony of witness Martin that "if they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through." This testimony of Mr. Martin concerns an alleged *rejection* of cars actually received and does not pertain to the *cancellation* of specific orders for cars which had not yet been received, as shown in Exhibit No. 8. Certainly, if appellee *rejected* a car, as alleged by Mr. Martin, there would have been no rational reason for it to *cancel* its outstanding order for a needed car.

V.

THE RECORD CONTAINS SUBSTANTIAL EVIDENCE THAT MARTIN BROTHERS HELD BOX CARS, AS WELL AS OTHER TYPES OF CARS, FOR THREE OR MORE DAYS AFTER THEY HAD BEEN PLACED ON ITS SPUR TRACK AT OAKLAND

In our opening brief we pointed out that the record contained uncontradicted showings that during the complaint period Martin Brothers had engaged in the extensive practice of holding box cars, as well as other types of cars, for three or more days (excluding Sundays and holidays) after they had been placed on its spur track (see table at top of page 48 of our opening brief). This evidence was expressly referred to by the Commission in its report (R. 120-121), and the Commission there stated:

"Such holding is relevant in a consideration of the complainant's ability to load cars in addition to those which were furnished."

The sole reply presented by appellee to this uncontradicted showing of record, recognized by the Commission as

“relevant”, is to refer to the “analysis” of this evidence by the District Court in its opinion. Not only does this analysis by the District Court represent a definite weighing of the evidence, contrary to the well established principles as to the power of the courts in reviewing decisions of the Interstate Commerce Commission (cited *supra*, p. 8), but, as we pointed out in our opening brief (p. 49), certain of the statements there made by the Court are directly contrary to and unsupported by the evidence of record. There is nothing in the Court’s analysis to detract from the showing made concerning the holding of cars, which constitutes substantial evidence that Martin Brothers at certain times during the complaint period would have been unable to load cars in addition to those which were furnished during the complaint period.

CONCLUSION

Appellee, in the conclusion to its brief, states:

“This is essentially not a difficult case. The facts are relatively simple and undisputed.”

With this statement of appellee we fully agree. The only question to be determined by this Court is whether the record made before the Commission contains substantial evidence to support the Commission’s findings of ultimate fact that Martin Brothers failed to establish that Southern Pacific “during the complaint period engaged in any unreasonable or otherwise unlawful practice as alleged in violation of Section 1 of the Act in furnishing or not furnishing cars” or subjected Martin Brothers “to any undue prejudice in violation of Section 3.” We submit that the record definitely

does contain such substantial evidence and that, therefore, the judgment of the District Court should be reversed.

Respectfully submitted,

JAMES C. DEZENDORF,
GEORGE B. CAMPBELL,
JAMES E. LYONS,
CHARLES W. BURKETT, JR.,
Attorneys for Appellant
Southern Pacific Company

San Francisco, California,
June 4, 1954.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon counsel for appellee by mailing, by first-class mail, three copies thereof addressed to Messrs. Irving Rand and Donald A. Schafer, Public Service Building, Portland 4, Oregon, and one copy thereof addressed to Mr. George L. Quinn, Bowen Building, Washington 5, D. C.

Dated at San Francisco, California, this 4th day of June, 1954.

CHARLES W. BURKETT, JR.

Of Counsel for Appellant
Southern Pacific Company

United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
v. *Appellants,*

THE MARTIN BROTHERS BOX COMPANY,
a corporation, *Appellee.*

**PETITION FOR REHEARING BY THE MARTIN
BROTHERS BOX COMPANY, APPELLEE**

GEORGE L. QUINN, Jr.,
815 15th Street N. W.,
Washington 5, D. C.,

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,

Attorneys for The Martin Brothers Box Company.

FILED

FEB - 4 1955

PAUL P. O'BRIEN,
CLERK



United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,
v.

THE MARTIN BROTHERS BOX COMPANY,
a corporation, *Appellee.*

PETITION FOR REHEARING

Believing that pride of opinion should not preclude correction of error, we will again give careful consideration to this case, thus following the admonition of an ancient law giver: "If today thou seest fit to judge differently from yesterday, do not hesitate to follow the truth as thou seest it; for truth is eternal, and it is better to return to the truth than to persist in the false." Statement by the late Justice H. Harry Belt in *Judson v. Bee Hive Auto Service Co.*, 136 Or. at p. 6.

To the HONORABLE WILLIAM HEALY, WALTER L. POPE
and RICHARD CHAMBERS, Circuit Judges:

Being of the firm belief after a painstaking examination of the three opinions rendered in this case that the majority misunderstood the decision rendered by the Interstate Commerce Commission, we are respectfully petitioning for a rehearing, and we urge the following considerations upon the Court:

As we read the opinion of Judge Healy, we conclude that he thought the Commission determined that the difference in the treatment accorded to The Martin Brothers by the Southern Pacific in supplying cars and that accorded to other shippers was, while discriminatory, a reasonable discrimination. He thought that since Congress has not defined discrimination and has prohibited only unreasonable discrimination it is within the exclusive province of the Commission to determine that a difference in treatment, or in effect a discrimination, is reasonable rather than a violation of the statute.

We do not agree with this legal proposition, but we do emphatically urge that there is no basis for such a proposition in the determination made by the Commission.

The position of the Southern Pacific throughout the entire proceedings, from the hearing before the examiner to the reply brief and argument in this Court, has consistently and vehemently been that no discrimination against the complainant was practiced—of any character, or to any extent whatever. The case was fought out before the examiner, and before the Commission and before the trial court and before this Court upon the factual issue of the reasonableness *of the requests of the shipper*, Martin, for transportation. The defense of the carrier was that *all* requests for transportation during the period in question, made by Martin by actual orders for cars, had been completely fulfilled. The phrases “car orders” and “written orders” jangle through and across nearly every page of the pleadings and the

briefs of the railroad. In the railroad's reply brief in this Court appears (p. 15) the following: "the record contains substantial evidence that Martin Brothers, as *a matter of fact*, made no 'reasonable' requests for the furnishing of *more cars than it actually received* during the nine-month complaint period." (Emphasis supplied)

The Commission itself determined this factual question against the contention of the railroad.

To make this clear, we summarize, at the risk of being tedious, the findings of the Commission on this question:

1. Martin's president discussed car requirements with officers of Southern Pacific and was given assurances that cars could be obtained (Commission Report, R. 110).

2. By letters in 1946 Martin informed Southern Pacific that its immediate minimum requirements were 36 cars per week, or 150 cars per month (Commission Report, R. 111).

3. During the complaint period Martin's "officers and other personnel complained to the defendant that adequate cars were not being received and that additional cars were urgently needed" (Commission Report, R. 111).

4. Martin's salesmen came to Oakland, where the Martin plant was located, to aid in the attempt to obtain more cars from defendant (Commission Report, R. 111).

5. A salesman of Martin spent three months during the complaint period "during which time he exerted all his efforts to obtaining more cars" (Commission Report, R. 111-2).

6. On several occasions this employee induced Southern Pacific employees to reconsider and assign a car for Martin's plant (Commission Report, R. 112).

7. This employee of Martin called upon Southern Pacific's Division Agent at Medford and also upon Southern Pacific's Freight Traffic Manager at Portland in his effort to get cars (Commission Report, R. 112).

8. Martin's employees visited the station office of the railroad at Oakland both in the forenoon and in the afternoon of each day to get cars, and while there "often called the defendant's office at Eugene with respect to the assignment of cars for the complainant" (Commission Report, R. 113).

9. Although more cars were furnished than requested by "written orders", nevertheless "complainant desired, required and attempted to secure additional cars from defendant" (Commission Report, R. 125).

10. "Defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable", but "the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent *nothing more than a written confirmation, for the defendant's records, that the*

complainant wanted the cars that had been assigned to it for that day" (Commission Report, R. 119-20; Emphasis supplied).

Thus, from the actual findings of the Commission, as set forth in the report of the Commission, the issue which was tendered by Southern Pacific as a defense, to the effect that all cars reasonably requested had been furnished, was decided squarely against the railroad.

That this was the issue, and that no issue of any difference in the treatment accorded to Martin than that accorded to other shippers, upon which a decision might be made that such difference was "reasonable", was presented to or considered by the Commission becomes more abundantly clear when the exceptions of the railroad to the report of the Examiner are considered. The 12 exceptions taken by the railroad to the report of the Examiner are set forth in the appendix to this petition in summary form. They are set forth in full in the amended petition before the District Court (R. 10-18). From these exceptions it appears that the whole issue presented to the Commission (other than objections to historical statements and the like) was the factual issue of whether the railroad accorded as favorable treatment to Martin as to other shippers. The contention that Martin was actually oversupplied with cars was repeated and repeated. The only legal contention that the railroad urged was that it was incumbent upon Martin to show that its competitors in the wire-bound box manufacturing business received more favorable treatment from the railroad than did Martin, and

that in the absence of such showing of a competitive relationship there could be no recovery of reparations.

Of the fact that there was a flagrant discrimination practiced against Martin during (and prior) to the complaint period, there is no doubt whatever, either on the evidence, or the findings actually made by the Commission. The determination by the Commission, that the car order blanks were neither conclusive nor persuasive evidence of the requests of Martin for cars, and that reasonable requests had been made other than by means of these blanks, destroyed forever the claim of non-discrimination. The Commission found that Martin was furnished 593 cars during the complaint period, "or an average of about three cars per working day." The Commission further found that Martin needed, and attempted to secure, cars in sufficient numbers to keep the Oakland plant operating at capacity during the entire complaint period and that with two shifts operating the car requirements were thirteen cars each day.

The Commission further found that while Martin required never less than 6 cars per day and from that up to 13 cars per day, and received about 3 cars per day, or from 25 to 50 percent of its requirements, other shippers received from 80 percent to 100 percent of their requirements, and those at points where the railroad had competition with other carriers received 100 percent of their requirements.

The apparent reason, and the only possible reason, for the decision which the Commission made, in the face of the findings which the Commission made, lies in

the contention presented by the railroad as to the necessity for a showing of a competitive relationship between the complaining shipper and more favored shippers. The railroad argued before the Commission (Exceptions p. 49): "The record in this case fails to show any competitive relationship between complainant, a manufacturer of wirebound boxes, and the other parties which complainant has alleged received more favorable treatment . . . there was no showing that complainant was in competition with the shippers at the points where Mr. Forrest found, as he stated, 'no evidence of shortage'. Because there was an issue as to the violation of Section 3, in respect of which the complainant did not sustain its affirmative burden of proof, the Examiner committed error in not finding for the defendant on this issue."

The Commission found and concluded: "The defendant points out that the complainant has not shown that it is in competition with any shipper. . . . The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed."

Throughout the report there is no finding or conclusion that the discrimination practiced against Martin during this time was in any degree whatever a reasonable discrimination. The sole justification for the discrimination according to the Commission was lack of competition.

The opinion of Judge Healy seems to be that the decision of the Commission was a determination that

the discriminatory practices of the railroad were reasonable. He would not otherwise be justified, having just previously in his opinion stated that "factual determinations [are] confided by Congress to the judgment and discretion of the Commission", in calling attention to "substantial testimony in the record" in subjoined notes.

But it is the railroad that is asking this Court again to try out the facts. Martin has insisted throughout that every essential fact in the record found by the Commission coincided in every respect with the finding of the Examiner. The Commission (as Judge Healy says) did not distort the record. The Commission did find to be without any basis or significance the "substantial testimony" referred to in the subjoined note. In fact, Judge Solomon determined that except for the "Conclusions" of the Commission, "the findings of the Examiner were practically identical to those of the Commission", and the Southern Pacific claims that this was an error upon the basis of which this Court should reverse Judge Solomon (Statement of Points on Appeal, R. 686). Judge Healy determined that the Commission in its report did not in any way distort the record before the Examiner, and Judge Solomon determined that the findings of the Commission and those of the Examiner were practically identical. If this was an error of Judge Solomon it must be an error of Judge Healy. If not, neither was in error and Judge Solomon should not be reversed.

The error of the Commission was in failing to find that the discrimination practiced against Martin was

“unreasonable”, or at least in failing to make a finding that it was either reasonable or unreasonable, and in finding *per contra* that reparations, where discrimination is in fact found to exist, may be recovered only by a showing of a competitive relationship between the one discriminated against and those unduly favored.

Appeals to this Court are supposedly tried and disposed of upon the errors specified, not upon other grounds.

The errors specified by both appellants are in the record at pages 686 to 694.

It is interesting to note that while Judge Healy found no distortion of the record made before the Examiner as a reason for affirming the Commission, the Southern Pacific (R. 686) specifies as the first error of the District Court a finding that the findings of the Examiner were practically identical with those of the Commission.

Following this no less than twelve points upon which the railroad would rely on the appeal have to do solely with the reasonable requests of Martin for transportation—a matter which the Commission found against the railroad upon exceptions from the same findings by the Examiner, as we have shown above.

Point XIII (R. 691) says the *trial court erred* in finding and concluding that “Nothing in the Act and no decision that I have been able to find permits discrimination as between shippers merely because they are not in the same type of business and therefore do not compete against each other.” In other words the rail-

road asks this Court to reverse the trial court for refusing to legalize discrimination among non-competing shippers.

The remaining points upon which Southern Pacific relies on this appeal, and, as near as we can determine from reading them, the points upon which the Commission relies, are upon the sufficiency of the proof of damages, or are of the shot-gun or boiler plate variety, pointing out no specific error of the trial judge but declaiming generally that the decision, being against the appellants, was wrong.

The one real issue raised by the railroad before the Examiner, and repeated before the Commission, and raised and repeated again before the trial court, and repeated again before this Court, was the issue of fact of whether the railroad actually supplied the complainant with all of the cars which the complainant requested and had any need for. The Commission as trier of the facts, on substantial evidence, resolved this issue against the railroad.

Upon review the trial court sustained the Commission upon these findings of fact, but reversed the Commission upon its conclusion that a competitive relationship must be shown to recover reparations and its conclusion that the proof of damages was not sufficient, and remanded the matter to the Commission for further proceedings.

The basis of the opinion of a majority of this Court seems to be that the decision by the Commission, erroneous as it may be, is conclusive upon the courts, and may not be reviewed.

We do not think that this doctrine of administrative finality renders this Court, or rendered the trial court, helpless to correct obvious and judicially ascertained error. The scope of judicial review may be narrow, but courts are not as impotent as the majority opinion would make them.

I.C.C. v. Union Pacific, 222 U.S. 541, referred to by Judge Healy, decides not so much that Commission orders are not to be set aside if within the Commission's statutory power and supported by substantial evidence, but decides rather that a Commission order *must* be set aside by the courts if found to be "based upon a mistake of law," or if the Commission's authority "has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

The Administrative Procedure Act of 1946 (5 U.S.C.A. § 1001 to § 1011) requires that the reviewing court "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or application of any agency action" (5 U.S.C.A. § 1009).

Under this section reviewing courts are required to "set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;"

Furthermore, this Act provides (5 U.S.C.A. § 1007) that in cases in which agencies (here the Commission) have not presided at the reception of evidence, the

officer who presided shall initially decide the case, and prior to decision upon agency review of the decision of the officer (in this case the Examiner) the parties shall be afforded opportunity to submit exceptions and supporting reasons for such exceptions, and the record shall show the ruling upon each such exception presented.

The Commission report commences with the statement that exceptions not discussed in the report nor reflected in the findings or conclusions have been given consideration and found not justified. The action taken or disposition made upon the twelve exceptions to the report of the Examiner is shown in the appendix under each exception in summary form.

Consideration of this statutory provision and of the exceptions to the report of the Examiner taken by Southern Pacific and the disposition made by the Commission of these exceptions again make abundantly clear (1) that the Commission did not consider or decide upon the reasonableness or unreasonableness of the discrimination practiced by the Southern Pacific, and (2) that the Commission decided this case in an arbitrary and capricious manner and in a manner contrary to law, in that the basis for the decision was the failure of the complainant to show that competitors of the complainant received the more favorable treatment, and that there was no sufficient proof of damage any way.

For many years the railroads were in the favored position, most aptly described as "Heads I win—tails you lose." If a shipper filed a complaint with the Commission and the Commission determined that he had

been damaged by reason of discrimination or other unlawful practice on the part of the railroad, then the railroad could sit back and ignore the order of the Commission. If the shipper proceeded in court he had only a *prima facie* case against the railroad and was in effect compelled to try his case all over again.

If, on the other hand, after a hearing before the Commission there was a determination, no matter how erroneous or contrary to the law, that the shipper was not entitled to damages, he was entirely without any remedy under the now happily discarded "negative order" doctrine.

The Supreme Court of the United States in *United States v. I.C.C.*, 337 U.S. 426, 69 Sup. Ct. 1410, 93 L. Ed. 1451, threw this negative order doctrine in the ash can, where it properly belonged. At the same time the specious doctrine of "administrative finality" was cut down to size. As to the review to be afforded shippers who have been unjustly denied reparations by the Commission, the court had this to say:

"The contention of the Commission and the railroads as to § 9 is this. A shipper has an alternative. He may bring his action before the Commission or before the courts. But he must make an election. If he elects to 'bring suit' in a court and is unsuccessful, he retains the customary right of appellate review. If he elects to 'make complaint to' the Commission, as the Government did, and relief is denied, he is said to be barred by the statutory language of § 9 from seeking any judicial review of the Commission order. Under the contention the order is final and not reviewable by any court even though entered arbitrarily, without substantial supporting evidence, and in defiance of law.

"Such a sweeping contention for administrative finality is out of harmony with the general legislative pattern of administrative and judicial relationships. See, e.g., *Shields v. Utah-Idaho Cent. R. Co.*, 305 U.S. 177, 181-185, 59 S. Ct. 160, 162-164, 83 L. Ed. 111; *Stark v. Wickard*, 321 U.S. 288, 307-310, 64 S. Ct. 559, 569-571, 88 L. Ed. 733. And this Court has consistently held Commission orders reviewable upon charges that the Commission had exceeded its lawful powers. See, e.g., *Interstate Commerce Commission v. Louisville & N. R. Co.*, 227 U.S. 88, 91-93, 33 S. Ct. 185, 186-187, 57 L. Ed. 431; *Chicago Junction Case*, 264 U.S. 258, 266, 44 S. Ct. 317, 320, 68 L. Ed. 667. . . .

"While the Government here does not seek enforcement of a Commission order for the payment of money, the root of the controversy concerns the payment of money damages under 49 U.S.C. §§ 8, 9, 49 U.S.C.A. §§ 8, 9. Had the Commission made an award to the Government it could have filed a civil suit to recover money damages under the provisions of 49 U.S.C. § 16 (2), 49 U.S.C.A. § 16 (2). That section provides that such a suit 'shall proceed in all respects like other civil suits for damages * * *—that is, before one district judge. And an appeal from a judgment in such a case goes to the Court of Appeals. The same one-judge trial and *appeal procedure available for enforcement of and award order would appear to be an equally appropriate and adequate tribunal for adjudication of validity of a Commission order denying reparations*. For actions to enforce Commission orders awarding reparation, and actions to challenge Commission orders denying reparations, basically involve the same parties, the same disputes, the same claims for money damages, and the same statutes." (Emphasis supplied)

In further proceedings in this case of *U. S. v. I.C.C.*, after the remand to the district court, the matter was

submitted on the record before the Commission. District Judge Morris decided that, while judicial review should "unhesitatingly demand fair treatment of the parties at interest and prevent any action which is arbitrary or not in accordance with law", the decision of the Commission was founded on ample evidence and was in accord with law (92 F. Supp. 1002).

This decision of Judge Morris was reversed by the Court of Appeals, 198 F. 2d 958. The majority opinion in this decision correctly states the true rule as to the nature of judicial review. The case was decided on its merits, with the entire record considered and weighed. The court proceeded to "examine the legal and factual basis for each of these conclusions' of the Commission (198 F. 2d at 965). The court said that while the Commission's views as to questions of law arising in the course of its duties are entitled to weight, nevertheless "there are occasions even in this field where the courts are required to apply 'the fixed law to the established fact' " (198 F. 2d at 968).

The Supreme Court of the United States refused to grant certiorari, 344 U.S. 893, 97 L. Ed. 691, 73 S. Ct. 212. The Supreme Court had previously said in this same case that the Commission cannot decide a matter "in defiance of standards established by Congress to determine when reparations are due." 337 U.S. 435, 69 S. Ct. 1415.

Here is the heart of the error in the opinion of Judge Healy, in which Judge Chambers dubiously concurs:

The doctrine of administrative finality extends only to findings of fact based upon substantial evidence. Conclusions, whether designated as ultimate findings or conclusions of law, are not a finality conclusive on the courts.

Here the Commission found as a fact that Martin received substantially less than half of the cars requested and required while other shippers received generally 100 percent of their requirements. These were findings of fact which, under the doctrine of administrative finality, the courts should not disturb. But it is for the courts to say whether the conclusions or ultimate findings on these facts are proper or are improper conclusions. Suppose the railroad had refused service entirely to Martin while supplying other shippers in full and the Commission had so found but had concluded that Martin was not entitled to reparations, would this conclusion be binding upon the courts? Judge Healy's opinion necessarily answers this is the affirmative. But this supposition makes it apparent that the conclusions of the Commission were simply conclusions of law which are not protected in any sense by the doctrine of administrative finality.

Judge Chambers found, as did the Examiner and as did Judge Solomon and as did Judge Pope, "an unfair discrimination by Southern Pacific Company".

The Commission never determined whether the discrimination which the Commission found to have been practiced by Southern Pacific Company was a reasonable discrimination, or whether it was an unlawful discrimination. The Commission did not find that "there

was no undue discrimination under the circumstances of the case", but found rather that the discrimination was between a lone light-load shipper on the one hand and shippers with heavy pay-bottom loads not competing in the wire bound box business on the other hand.

But as we have shown the Supreme Court of the United States has held categorically that the Interstate Commerce Act and all amendments to it have aimed at wiping out discrimination of all types (U. S. v. B. & O. R. Co., 333 U.S. 169) and neither the Commission nor the courts are at liberty to act in defiance of this standard established by Congress (U. S. v. I.C.C., 337 U.S. 435).

It is respectfully submitted that this cause should be remanded to the Commission for further proceedings.

GEORGE L. QUINN, JR.,
815 15th Street, N. W.,
Washington 5, D. C.,

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,

Attorneys for Appellee-Petitioner.

In accordance with Rule 23 of this Court, Appellee suggests that should a majority of the Judges having heard this matter grant a rehearing, the case be heard en banc.

I hereby certify that in my judgment the foregoing petition for rehearing is well founded and is not interposed for delay.

A handwritten signature in cursive script, reading "Irving Rand", written over a horizontal dashed line.

Irving Rand
Of Attorneys for Petitioner.

Summary of Individual Exceptions of Defendant Railroad to Examiner's Proposed Report And the Action of the Commission Thereon

The exceptions of the railroad to the Examiner's report are set forth in the amended petition in the District Court (R. 10-18) and in summary form are as follows:

1. Exception to the historical statements, and Martin's conversations with the railroad's representatives, as irrelevant and immaterial, the action being "predicated upon a statutory obligation and not upon any alleged contractual relation."

The Commission failed to sustain the railroad on this exception and adopted the report of the Examiner in toto.

2. Exception to Martin's complaints that adequate cars were not being received and that additional cars were urgently needed as these "do not constitute specific car orders and do not constitute a reasonable request for specific cars, as provided by Section 1 (4) of the Act."

The Commission failed to sustain the railroad on this exception and adopted the statement of the Examiner verbatim.

3. Exception to the finding of the Examiner concerning Martin's inability to fill orders for Martin's customers for lack of transportation as "irrelevant and immaterial."

The Commission failed to sustain the railroad on this exception and adopted the finding of the Examiner verbatim.

4. Exception to the finding that Martin would ascertain from Eugene how many cars were assigned to it and then place an order for these cars as "unsupported by the evidence" and as not modifying, amending or adding to "the specific orders which were actually placed."

The Commission failed to sustain this exception and adopted this finding of the Examiner in toto.

5. Exception to the finding that the carrier knew the shipper wanted more cars than were listed on the order blanks as an erroneous conclusion of the Examiner because the railroad's duty to supply cars was measured by the shipper's knowledge that "complainant was refraining from ordering all the cars it could use would not constitute a waiver of the requirement for specific car orders."

The Commission failed to sustain the railroad on this exception and adopted this finding of the Examiner in toto.

6. Exception to the statement that the few cars held for several days may have been cars restricted for loading to particular destination areas as overlooking "the significance of complainant holding cars on hand for several days as pertinent to its claim for damages," and as not of "appropriate definiteness."

The Commission failed to sustain the railroad on this exception and adopted this finding of the Examiner in toto.

7. Exception to the finding that Martin did not receive its fair share of the cars available as "not supported by the record but are contrary thereto and are based upon a misapplication of the law. Our reasons are more fully developed in the subjoined argument."

The subjoined argument is found at pages 13 to 43 of the "Exceptions of Defendant to Proposed Report and Request for Oral Argument", introduced as part of the record in this case. It will be referred to hereafter as the "Carrier's Exceptions". This argument concerns exceptions 2, 4, 5, 7, 11 and 12 considered together and is devoted entirely to the "specific written order" or "specific car order" theme, and concludes, "because the complainant cannot recover for the non-furnishing of cars which it did not order, the Commission should sustain defendant's exceptions numbered 2, 4, 5, 7, 11 and 12." The issue before the Commission on this exception was confined to the factual situation of whether in fact the carrier furnished the shipper the cars for which the shipper made reasonable request, the contention of the carrier being that the carrier actually oversupplied the shipper, furnishing more cars than the shipper could use or for which the shipper made reasonable request. The Commission on this issue of fact failed to sustain the railroad and adopted the report of the Examiner in toto.

8. Exception to the "entire discussion of the question of damages" as "unnecessary."

The Commission did not sustain the railroad on this exception as to the discussion of damages being "unnecessary," but did conclude (erroneously in the opinion of District Judge Solomon and in the opinion of Circuit Judge Chambers and of Circuit Judge Pope) that the evidence fell short of the requirement to support an award of reparations, as "the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court."

9. Exception to any discussion or conclusions concerning damages, the Examiner's award of damages being made "upon erroneous allocation of cars to complainant contrary to its specific car orders and without any reasonable request therefor to defendant."

The Commission failed to sustain the railroad on this exception on the question of the allocation of cars to complainant. On other grounds, not for any reason stated in the exceptions, the Commission concluded that reparations should be denied.

10. Exception to the failure of the Examiner to conclude that the carrier established and enforced an equitable rule of car disposition.

The Commission failed to sustain the railroad on this exception and adopted the report of the Examiner in this respect in toto.

11. Exception to the proposed ultimate general findings and conclusions of the Examiner as objectionable on the grounds expressed in the preceding exceptions.

The Commission did sustain the railroad in regard to the conclusion that there should be no reparations awarded, but not on any of the grounds urged in the arguments of the railroad.

12. Exception to the failure of the Examiner to find that the complainant was supplied with all of the cars to which it was legally and equitably entitled.

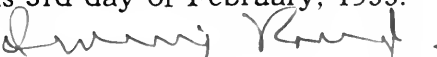
In the argument of this exception (Carrier's Exceptions p. 49) the carrier argued to the Commission: "The record in this case fails to show any competitive relationship between complainant, a manufacturer of wirebound boxes, and the other parties which complainant has alleged received more favorable treatment. The only specific parties concerning whose car supply complainant presented evidence were Timber Structures, Inc., and the six concerns listed in Exhibits Nos. 2 to 7, but nothing was shown as to their competitive relationship with complainant."

Inasmuch as the railroad in this argument (Carrier's Exceptions p. 47) definitely stated that the evidence showed that the railroad "applied the distribution rule *equally* to all lumber shippers on the Portland Division, including Martin Brothers Box Company", and the Commission found to the contrary the controlling reason for sustaining this exception, as the Commission did, was on the basis of the non-competitive relationship between Martin and the other shippers. Otherwise stated, the Commission decided against the carrier on this exception as to the fact of discrimination, but

adopted the legal contention submitted by the carrier. This is demonstrated by the finding of the Commission (R. 125): "The complainant has not established that any of its competitors was unduly preferred by the practices of the defendant here assailed."

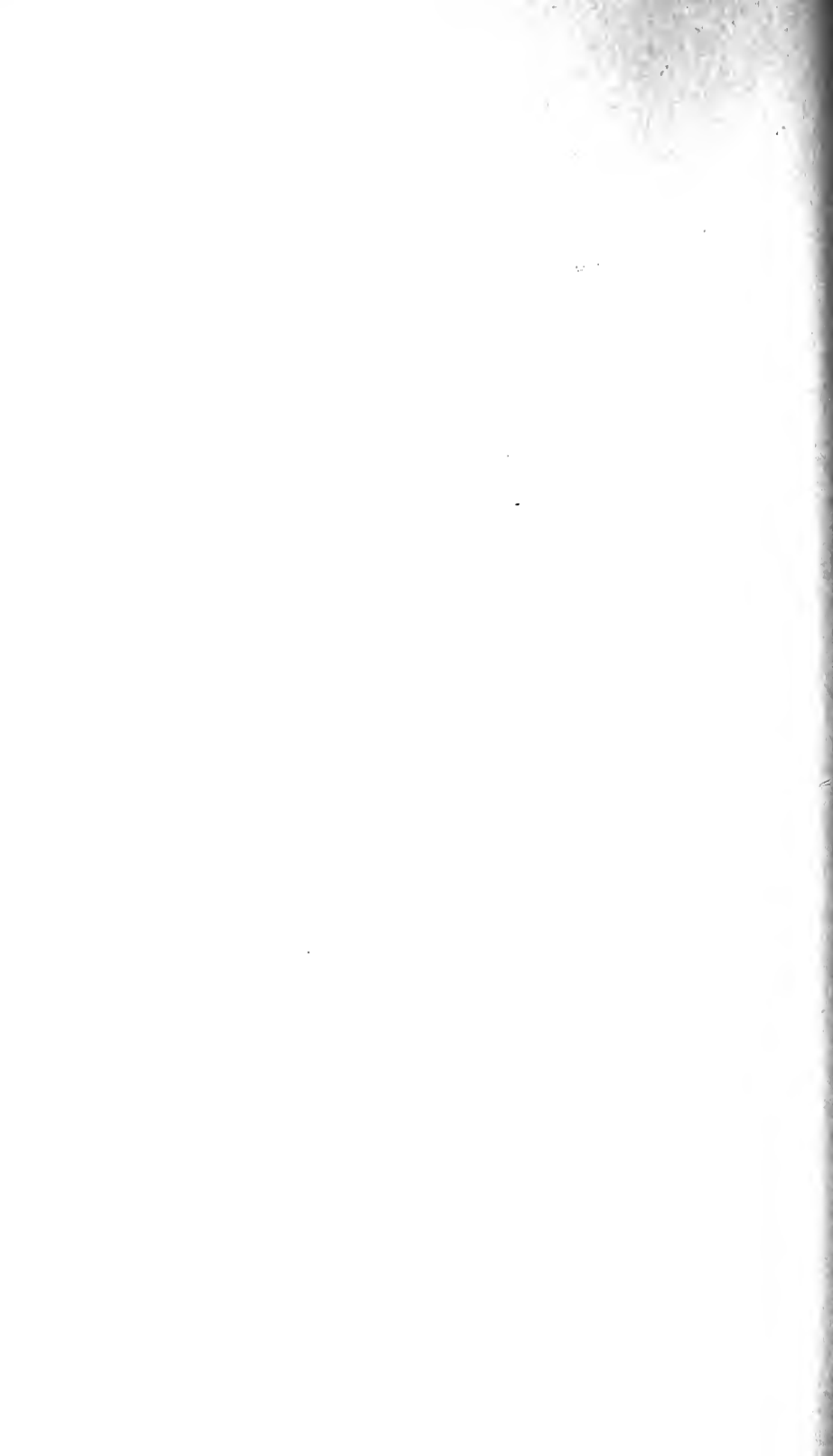
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing Petition for Rehearing upon counsel for the Appellants by mailing, by first class mail, three copies thereof addressed to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland, Oregon, and one copy thereof addressed to James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco, California, and three copies thereof addressed to Edward M. Reidy, Interstate Commerce Building, Washington, D. C., and one copy thereof addressed to William L. Harrison, Flood Building, San Francisco, California. Dated at Portland, Oregon, this 3rd day of February, 1955.



IRVING RAND,

Of Attorneys for Appellee.



No. 14077

**In the United States Court of Appeals
for the Ninth Circuit**

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS
v.

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION,
APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON*

**BRIEF FOR INTERSTATE COMMERCE COMMISSION,
APPELLANT**

FILED

APR 15 1954

PAUL P. O'BRIEN
CLERK



INDEX

	Page
STATEMENT AS TO JURISDICTION.....	1
STATEMENT OF THE CASE.....	3
SPECIFICATION OF ERRORS RELIED UPON IN THIS APPEAL.....	8
ARGUMENT.....	9
I. The scope of judicial review of Commission orders.....	9
II. The evidence supports the Commission's finding that the Southern Pacific did not engage in any unreasonable or otherwise unlawful practice in violation of section 1 of the act.....	16
III. The evidence supports the Commission's finding that the Southern Pacific did not subject appellee to any undue prejudice in violation of section 3 of the act.....	30
CONCLUSION.....	33

CASES CITED

<i>Alton Railroad Co. v. United States</i> , 315 U. S. 15.....	10
<i>Americus & Co. v. Pennsylvania R. R. Co.</i> , 181 I. C. C. 5.....	33
<i>Baltimore & Ohio R. Co. v. United States</i> , 298 U. S. 349.....	11
<i>Board of Trade of Kansas City v. United States</i> , 314 U. S. 534.....	10, 15
<i>California Cotton Oil Corp. v. Atchison, T. & S. F. Ry. Co.</i> , 218 I. C. C. 97.....	33
<i>Chicago, St. P., M. & O. Ry. Co. v. United States</i> , 322 U. S. 1.....	10
<i>Federal Power Commission v. Hope Natural Gas Co.</i> , 320 U. S. 591.....	11
<i>Gray v. Powell</i> , 314 U. S. 402.....	10
<i>Hanna Furnace Corp. v. United States</i> , 53 F. Supp. 341, affirmed, 323 U. S. 667.....	13
<i>Illinois Cent. R. R. v. Inter. Com. Comm.</i> , 206 U. S. 441.....	15
<i>Interstate Commerce Commission v. Hoboken Manufacturers Railroad Co.</i> , 320 U. S. 368.....	10
<i>Interstate Commerce Commission v. Jersey City</i> , 322 U. S. 503.....	27
<i>Interstate Commerce Commission v. Union Pacific Railroad Co.</i> , 222 U. S. 541.....	9
<i>Johnston Seed Co. v. United States</i> (Tenth Circuit), 191 F. 2d 228.....	15
<i>Lynchburg Traffic Bureau v. United States</i> , 84 F. Supp. 1012.....	15
<i>Martin Bros. Box Co. v. Southern Pacific Co.</i> , 280 I. C. C. 395.....	3
<i>Mississippi Valley Barge Line Co. v. United States</i> , 292 U. S. 282.....	10
<i>O'Keefe v. United States</i> , 240 U. S. 294.....	10

	Page
<i>Old Colony Furniture Co. v. United States</i> , 95 F. Supp. 507-----	2
<i>Pennsylvania Co. v. United States</i> , 236 U. S. 351-----	15
<i>Rochester Telephone Corp. v. United States</i> , 307 U. S. 125-----	10
<i>Shields v. Utah-Idaho Central R. Co.</i> , 305 U. S. 177-----	2
<i>Swift & Co. v. United States</i> , 316 U. S. 216-----	15
<i>Traffic Bureau, Lynchburg Cham. of Com. v. C. & O. Ry. Co.</i> , 234 I. C. C. 765-----	33
<i>United States v. Carolina Freight Carriers Corp.</i> , 315 U. S. 475-----	10
<i>United States v. Chemical Foundation</i> , 272 U. S. 1-----	10-11
<i>United States v. Interstate Commerce Commission</i> , 337 U. S. 426-----	2, 7, 9
<i>United States v. Pierce Auto Freight Lines</i> , 327 U. S. 515-----	10
<i>United States v. Wabash Railroad Co.</i> , 321 U. S. 403-----	10
<i>Virginia Stage Lines v. United States</i> , 48 F. Supp. 79-----	12
<i>Virginian Ry. Co. v. United States</i> , 272 U. S. 658-----	10
<i>Western Paper Makers' Chemical Co. v. United States</i> , 271 U. S. 268--	10, 11

STATUTES CITED

Section 1, Paragraph (4), Part I, Interstate Commerce Act (49 U. S. C., Section 1 (4))-----	3-4
Section 1, Paragraph (11), Part I, Interstate Commerce Act (49 U. S. C., Section 1 (11))-----	4
Section 3, Paragraph (1), Part I, Interstate Commerce Act (49 U. S. C., Section 3 (1))-----	4
Section 17, Paragraph (9), Part I, Interstate Commerce Act (49 U. S. C., Section 17 (9))-----	6

In the United States Court of Appeals for the Ninth Circuit

No. 14077

INTERSTATE COMMERCE COMMISSION ET AL., APPELLANTS

v.

THE MARTIN BROTHERS BOX COMPANY, A CORPORATION,
APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON*

BRIEF FOR INTERSTATE COMMERCE COMMISSION,
APPELLANT

STATEMENT AS TO JURISDICTION

This is an appeal from the final judgment of the District Court entered on August 25, 1953, annulling, vacating and setting aside an order of the Interstate Commerce Commission, hereinafter referred to as the Commission, dismissing the complaint of appellee which sought an award of reparation from the Southern Pacific Company (R. 74-75). The jurisdiction of the District Court was invoked under the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219, 28 U. S. C. 1336, et seq. (R. 4).

The jurisdiction of the Circuit Court of Appeals to review a final judgment of the District Court is to be

found in Section 225, Title 28 U. S. C. The Court's attention is respectfully directed to the fact that the suit below was heard by the District Court, as ordinarily constituted, before a single judge by virtue of the decision of the Supreme Court in *United States v. Interstate Commerce Commission*, 337 U. S. 426 (R. 43). It is clear from that decision that judicial review of a Commission order denying reparation is under the Urgent Deficiencies Act above cited, and the only change in procedure made is that "a district court entertaining such a challenge shall be composed of one judge" instead of "three judges" and that its judgment shall be appealed to the Court of Appeals instead of "directly to this Court" (p. 441). The Court's holding was specific (pp. 440-1) that "a Commission order dismissing a shipper's claim for damages under 49 U. S. C. § 9 is an 'order' subject to challenge under 28 U. S. C. (1946 ed.) § 41 (28)" now found in substance in 28 U. S. C. (1948) § 1336. *Old Colony Furniture Co. v. United States*, Dist. of Mass., 95 F. Supp. 507.

The instant case was not a trial *de novo* in the District Court and the question on judicial review was simply whether the Commission acted within its statutory authority and whether its findings had a basis in substantial evidence. *Shields v. Utah-Idaho Central R. Co.*, 305 U. S. 177, 185. The District Court, therefore, was required to hear and decide the case in accordance with the law and procedure applicable to hearings before a three-judge court, including the principles governing judicial review of Commission orders, and the force and effect given by the courts

to administrative determinations. The rules and scope of judicial review will be dealt with in Chapter I, *infra*.

STATEMENT OF THE CASE

The appellee corporation is engaged primarily in the manufacture of wire-bound wooden boxes with plants located at Oakland, Oregon, and Toledo, Ohio (R. 78, 108–109).

On October 14, 1947, appellee filed a complaint with the Commission, in a proceeding entitled *Martin Brothers Box Company v. Southern Pacific Company*, Docket No. 29852 (280 I. C. C. 395), in which it alleged that during the period January 1 to September 30, 1947, the Southern Pacific Company (hereinafter referred to as Southern Pacific) failed in its duty to provide and furnish appellee with an adequate supply of box cars for the transportation of its manufactured products from the Oakland plant to interstate destinations, in violation of Section 1 (4) and (11) and Section 3 (1) of the Interstate Commerce Act (49 U. S. C. Sec. 1 (4) and (11) and Sec. 3 (1))¹

¹ Section 1 (4) provides that:

“It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation,

(R. 77-81). The relief prayed for was that the Commission enter an order commanding the Southern Pacific to provide appellee with "adequate and equal car service from Oakland, Oregon, to various destinations; and to pay to complainant the sum of \$2,259,000.00 as an award for damages" (R. 80-81). The answer of the Southern Pacific, duly filed, denied the material allegations contained in the complaint (R. 81-82).

In accordance with the usual procedure, followed by the Commission in such cases, the matter was as-
and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 1 (11) provides that:

"It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3 (1) provides that:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description."

signed for formal hearing before one of its examiners and hearings were held at Portland, Oregon, beginning on February 20, 1950. Following such hearings and the filing of briefs the examiner issued a proposed report recommending that the Commission find that the Southern Pacific failed in its duty to furnish adequate car service to appellee and that an award of damages be made in the amount of \$135,220.00 for such failure (R. 84-106). Exceptions to the examiner's report were filed by the parties to the proceedings, including appellee who requested an award of damages of "at least" \$205,606.00 and the case was orally argued before Division 3 of the Commission on February 14, 1951 (R. 656 et seq.). The Commission, by Division 3, issued the report and order, here under attack, on March 12, 1951. The report, which is the basis of the order (R. 127), is reported at 280 I. C. C. 395 and is in the record at pp. 108-126. In its report the Commission made the following ultimate finding (R. 126):

We find that complainant [appellee herein] has failed to establish that defendant [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the act in furnishing or not furnishing cars to complainant at Oakland, Oreg., or that defendant subjected complainant to any undue prejudice in violation of section 3. The complaint will be dismissed.

An order dismissing the complaint was entered contemporaneously with the report (R. 127).

Appellee filed a petition for reconsideration, pursuant to Section 17 (9) of the Act (49 U. S. C. 17 (9)),² on May 18, 1951, to which the Southern Pacific filed a reply in opposition on July 30, 1951. The petition for reconsideration was denied by the entire Commission by order of July 30, 1951 (R. 128).

The appellee filed a complaint in the District Court of the United States for the District of Oregon on November 27, 1951, naming the Commission and the United States as defendants (R. 3). The complaint sought to set aside the order herein, alleging that it was invalid for the following reasons:

(a) That said order lacks a rational basis because the findings do not support the Commission's conclusions.

(b) The Commission failed to make essential findings of fact that would support rationally its order.

(c) The Commission's findings of fact show that petitioner was damaged, is entitled to reparation, and such findings support no other conclusion.

(d) The Commission misapplied the law in making the order.

² Section 17 (9) provides that:

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to any matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set aside orders of the Commission, but not otherwise."

(e) The Commission's order is arbitrary, capricious, without support in and contrary to the law and the evidence (R. 18-27).

Appellee prayed for an order of the Court perpetually enjoining, setting aside, and annulling the order and remanding the case to the Commission "with specific directions to award petitioner such damages, as the court shall find petitioner to be entitled to under the evidence, and for further action not inconsistent with this court's decree" (R. 27, 28). It was also prayed that a statutory three-judge court be convened to hear the cause (R. 27). The prayer for a three-judge court was denied by the District Judge on authority of *United States v. Interstate Commerce Commission, supra* (R. 43).

The Southern Pacific, having been a defendant before the Commission, was permitted to intervene (R. 33) and it, as well as the United States and the Commission, duly filed their answers. The case came on for trial before Honorable Gus J. Solomon, United States District Judge at Portland, Oreg., on January 9 and 10, 1953. The opinion of Judge Solomon dated May 15, 1953 (R. 42) and judgment were filed August 25, 1953 (R. 74) on which date the Court's findings of fact and conclusions of law were entered, which adopted by reference its previously issued opinion (R. 40-41). The opinion and judgment are grounded on the holding that the Commission's report and order are not supported by substantial evidence (R. 63, 68, 73).

The Court's opinion does not question the adequacy of the Commission's ultimate finding, or that it misinterpreted or misapplied the law. Therefore, the only question presented in this appeal is whether the Court below, in the review of the Commission's report and order herein, could do more than to determine whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings that appellee failed to establish that the Southern Pacific's conduct, in furnishing or not furnishing cars to appellee at Oakland, Oreg., resulted in a violation of Section 1 or Section 3 of the Act.

SPECIFICATION OF ERRORS RELIED UPON IN THIS APPEAL

Appellant relies on the specification of errors set forth in its "Statement of Points on Which Appellant, Interstate Commerce Commission, Intends to Reply on Appeal" (R. 698-700).

Summarized they are as follows:

1. The District Court erred in attempting to weigh and evaluate the evidence upon which the Commission's findings are based instead of limiting its review to a determination of whether the findings of ultimate fact were supported by substantial evidence.

2. The District Court erred in failing to sustain the Commission's ultimate finding "that complainant [appellee] has failed to establish that defendant [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the act."

3. The District Court erred in failing to hold that the record contains substantial evidence to support the Commission's ultimate finding that the Southern Pacific did not subject the appellee "to any undue prejudice in violation of Section 3."

ARGUMENT

I

The scope of judicial review of Commission orders

As we have heretofore pointed out (pp. 2-3, *supra*), in view of the Supreme Court's decision in *United States v. Interstate Commerce Commission*, *supra*, the District Court was required to hear and decide appellee's complaint in accordance with the law and procedure applicable to hearings before the three-judge court, including the principles governing judicial review of Commission orders and the force and effect given by the courts to administrative determinations.

Determination of the ultimate question for decision involves testing the Commission's order by application of the well-established rules regarding judicial review of administrative determinations. A classical formulation of these rules was made in *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547. The Supreme Court there enunciated the general principle that orders of the Interstate Commerce Commission should not be set aside by a court if they are within the Commission's statutory power and are supported by substantial evidence.

The Court's opinion does not question the adequacy of the Commission's ultimate finding, or that it misinterpreted or misapplied the law. Therefore, the only question presented in this appeal is whether the Court below, in the review of the Commission's report and order herein, could do more than to determine whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings that appellee failed to establish that the Southern Pacific's conduct, in furnishing or not furnishing cars to appellee at Oakland, Oreg., resulted in a violation of Section 1 or Section 3 of the Act.

SPECIFICATION OF ERRORS RELIED UPON IN THIS APPEAL

Appellant relies on the specification of errors set forth in its "Statement of Points on Which Appellant, Interstate Commerce Commission, Intends to Reply on Appeal" (R. 698-700).

Summarized they are as follows:

1. The District Court erred in attempting to weigh and evaluate the evidence upon which the Commission's findings are based instead of limiting its review to a determination of whether the findings of ultimate fact were supported by substantial evidence.

2. The District Court erred in failing to sustain the Commission's ultimate finding "that complainant [appellee] has failed to establish that defendant [Southern Pacific] during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of Section 1 of the act."

3. The District Court erred in failing to hold that the record contains substantial evidence to support the Commission's ultimate finding that the Southern Pacific did not subject the appellee "to any undue prejudice in violation of Section 3."

ARGUMENT

I

The scope of judicial review of Commission orders

As we have heretofore pointed out (pp. 2-3, *supra*), in view of the Supreme Court's decision in *United States v. Interstate Commerce Commission*, *supra*, the District Court was required to hear and decide appellee's complaint in accordance with the law and procedure applicable to hearings before the three-judge court, including the principles governing judicial review of Commission orders and the force and effect given by the courts to administrative determinations.

Determination of the ultimate question for decision involves testing the Commission's order by application of the well-established rules regarding judicial review of administrative determinations. A classical formulation of these rules was made in *Interstate Commerce Commission v. Union Pacific Railroad Company*, 222 U. S. 541, 547. The Supreme Court there enunciated the general principle that orders of the Interstate Commerce Commission should not be set aside by a court if they are within the Commission's statutory power and are supported by substantial evidence.

Similar statements regarding the scope of judicial review are to be found in numerous other cases, including *O'Keefe v. United States*, 240 U. S. 294, 303; *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 482, 490; *Alton Railroad Co. v. United States*, 315 U. S. 15, 23; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546; *Interstate Commerce Commission v. Hoboken Manufacturers' Railroad Co.*, 320 U. S. 368, 378; *United States v. Wabash Railroad Company*, 321 U. S. 403, 408; *Chicago, St. Paul, Minneapolis & Omaha Railway Co. v. United States*, 322 U. S. 1, 3; *Gray v. Powell*, 314 U. S. 402, 411; and *United States v. Pierce Auto Freight Lines*, 327 U. S. 515. The general rule is that "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286-7; *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 146.

The Commission's judgment is to be exercised in the light of the facts of each individual case. The courts are not concerned with the correctness of the Commission's reasoning or with the consistency or inconsistency of decisions which it has rendered. *Virginian Ry Co. v. United States*, 272 U. S. 658, 663-666; *Western Paper Makers' Chemical Co. v. United States*, 271 U. S. 268, 271.

There is a presumption, in the absence of clear evidence to the contrary, that the Commission has properly performed its official duties; and this presumption supports its official acts. *United States v.*

Chemical Foundation, 272 U. S. 1, 14-15; *Baltimore & Ohio R. Co. v. United States*, 298 U. S. 349, 358-360; *Federal Power Commission v. Hope Natural Gas Co.*, 320 U. S. 591, 602.

In *Western Chemical Co. v. United States*, 271 U. S. 268, 271, the Supreme Court said:

The determination whether a rate is unreasonable or discriminatory is a question on which the finding of the Commission is conclusive if supported by substantial evidence, unless there was some irregularity in the proceeding or some error in the application of the rules of law. *Skinner & Eddy Corporation v. United States*, 249 U. S. 557, 562; *New England Divisions Case*, 261 U. S. 184, 204. No such irregularity or error is shown. In making its determinations the Commission is not hampered by mechanical rules governing the weight or effect of evidence. The mere admission of matter which under the rules of evidence applicable to judicial proceedings would be deemed incompetent does not invalidate its order. *United States v. Abilene & Southern Ry. Co.*, 265 U. S. 274, 288. There was ample evidence to support the finding that the joint through rates regarded as entireties were reasonable and justified. Prior existing rates, whether locals or such proportionate rates from a key point to points of destination as were made applicable to this particular class of traffic, or through rates upon other commodities moving from similar points of origin, are proper matters for consideration in establishing new through rates. To consider the weight of the evidence is beyond our province.

In *Virginia Stage Lines v. United States*, 48 F. Supp. 79, at p. 83, the Court said:

The function of "weighing" the evidence therefore, remains peculiarly one for the Commission "appointed by law and informed by experience," and not for the courts. *Alton Railroad Company v. United States*, 315 U. S. 15, 62 S. Ct. 432, 86 L. Ed. 586, *Gray v. Powell*, 314 U. S. 402, 62 S. Ct. 326, 86 L. Ed. 301. This is in accord with the realization that the regulation of transportation involves various economic factors and the exercise of an empirical judgment, since "The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City v. United States*, 1942, 314 U. S. 534, 546, 62 S. Ct. 366, 372, 86 L. Ed. 432.

Accordingly, aware of our duty in a proper case to set aside an order of the Commission which is not supported by substantial evidence or which is clearly based on an error of law, we refuse to accept the allegations of Virginia Stage in place of the conclusions of the Commission, since we find no patent reversible error wherein the Commission has transgressed. *United States v. Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971.

These principles of judicial review have nowhere (in our opinion) been better stated than in the de-

cision of Judge Knight for the court in *Hanna Furnace Corp. v. United States* (affirmed, 323 U. S. 667) 53 F. Supp. 341, 344, where it was said:

The Supreme Court has many times laid down rules which are definitely applicable here.

"The credibility of witnesses and weight of evidence are for the Commission and not for the courts, and its findings will not be reviewed here if supported by evidence." *Merchants Warehouse Co. v. United States*, 283 U. S. 501, 508, 51 S. Ct. 505, 508, 75 L. Ed. 1227. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co. v. United States*, 292 U. S. 282, 286, 54 S. Ct. 692, 694, 78 L. Ed. 1260. "The findings of the Commission are made by law prima facie true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience. * * *

And in any special case of conflicting evidence a probative force must be attributed to the findings of the Commission, which, in addition to "knowledge of conditions, of environment, and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying." *Illinois Cent. R. Co. v. Interstate Commerce Comm.*, 206 U. S. 441, 454, 27 S. Ct. 700, 704, 51 L. Ed. 1128. Referring to the last-mentioned case, the Supreme Court in *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 59 S. Ct. 754, 761, 83 L. Ed. 1147, which case went up on appeal from a three-judge court in this district, said: "Recognition of the Commis-

sion's expertise also led this Court not to bind the Commission to common law evidentiary and procedural fetters in enforcing basic procedural safeguards. From these general considerations the Court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 S. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the doctrine of administrative finality. Even when resort to courts can be had to review a Commission order, the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied, the Commission's order becomes incontestable." Vide also: *Interstate Commerce Comm. v. Union Pac. R. Co.*, 222 U. S. 541, 32 S. Ct. 108, 56 L. Ed. 308. In view of the investigations made by the Commission in the matters of concern here, the "knowledge of conditions, of environment and of transportation relations" so acquired has additional weight.

The question is not whether the lower Court, upon a consideration of the record that the Commission had before it, would make the same findings as the Commission; the question rather is, Was there rational basis for the findings that the Commission did make?

It is well established by the courts that the ultimate findings of the Commission as to whether or not rates, tariffs, regulations, or practices of railroads are in violation of Sections 1, 2, and 3 of the Act, are questions of fact to be determined by the Commission and are not questions of law for determination by the Courts. *Lynchburg Traffic Bureau v. United States*, 84 F. Supp. 1012, 1016; *Johnston Seed Co. v. United States* (Tenth Circuit), 191 F. 2d 228, 231; *Illinois Cent. R. R. v. Inter. Com. Comm.*, 206 U. S. 411, 441, 455; *Pennsylvania Co. v. United States*, 236 U. S. 351, 361; *Board of Trade of Kansas City v. United States*, 314 U. S. 534, 546; *Swift & Co. v. United States*, 316 U. S. 216, 230-231.

From a review of the cases cited in this chapter of our brief, it is clear that the District Court's function is limited to a determination of whether the Commission's ultimate findings of fact are supported by substantial evidence on the record as a whole. Therefore, that court committed error in attempting to analyze and weigh the evidence summarized in the Commission's report (no consideration being given to the other evidence of record) instead of determining whether there was substantial evidence on the whole record to support the Commission's ultimate finding of fact which was all that the court could do in the premises.

We shall now turn to a discussion of the evidence which we feel amply supports the Commission's findings.

II

The evidence supports the Commission's finding that the Southern Pacific did not engage in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Act

Bearing in mind the rules applicable to judicial review of orders of the Commission and that the weighing of the evidence in a particular case is for the Commission, referred to at pages 9 to 15 of this brief, we now consider the evidence the Commission had before it bearing on both the alleged Sections 1 and 3 violations.³

The following witnesses appeared before the Commission and testified:

The first witness called, F. J. Martin, the President of the plaintiff (R. 131), testified as to the operation of the plant at Oakland, Oreg. (R. 131-137). His plant has loading space for about 25 rail cars (R. 137-138). His plant is dependent on rail service (R. 143). His nearest competitors on wire-bound boxes were at Houston, Tex., and Kansas City, Mo. (R. 144). Before locating his plant at Oakland witness talked with railroad officials about car supply (R. 146-147) and advised they would need approximately 13 cars per day 5 days a week (R. 149). His company had booked 200 carloads of wire-bound boxes for sale to purchasers before the plant started (R. 155). Even before

³ The appellee had alleged in its complaint before the Commission that the Southern Pacific had failed to provide it with transportation from its plant at Oakland, Oreg., to various destinations upon reasonable request therefor and to furnish it with adequate car service, in violation of Section 1 (4) and (11), and also had subjected appellee to undue and unreasonable prejudice in violation of Section 3 of the Act.

starting to ship boxes his company encountered a car shortage beginning in August of 1946 (R. 157). The number of cars his company shipped from Oakland to Toledo, beginning in January 1947, were as follows:

January-----	32 cars.	June-----	6 cars. ¹
February-----	47 cars.	July-----	2 cars.
March-----	27 cars.	August-----	6 cars.
April-----	10 cars.	September-----	None.
May-----	12 cars.		

¹ The most severe shortage of cars was from June to October 1947 (R. 616).

During the complaint period we received less than three cars per day average (R. 171). There was a car shortage on the Southern Pacific during the 9-month complaint period (R. 177-178). The witness stated his company put in plywood machinery to change the operation into plywood (R. 192). When he took over the plant on March 4, 1946, between 12 and 15 cars could be spotted on the track at the Oakland plant (R. 197-198). Six cars could be spotted in loading position at Oakland at that time (R. 198). He had to have watertight box cars for our wire-bound boxes during the complaint period (R. 209). The California Barrel & Box Company at Arcata, Calif., is his competitor in the West in connection with the manufacture and sale of wire-bound boxes (R. 209-210). Witness stated he never signed a car order in his life although he had ordered hundreds of cars (R. 224). The railroad never refused to accept a car after it was loaded and he gave them the shipping papers. He moved lots of Southern Pacific cars to points off the Southern Pacific lines during the complaint period (R. 228). On July 1 to September 24, 1947, he received a total of 201 cars (R. 257-258). To keep one shift running at the Toledo mill it was

necessary to have 65 cars of lumber per month (R. 268-269).

The next witness was Mr. R. G. Holland, package designing engineer and sales representative of the Martin Bros. Box Company (R. 276). He testified that he made daily calls to the local railroad office in 1946 in an effort to secure more cars; also between April 1 and July 1, 1947 he made daily efforts to secure more cars (R. 284). Through these efforts he secured an additional occasional car for his plant (R. 287).

Mr. William F. Forrest, Eugene, Oreg., President and General Manager of the Forrest Veneer Company, Curtin, Oreg. (R. 297), testified his company found it more difficult to secure cars at Eugene, Oreg., than at Portland (R. 300). He testified as to the survey he made for complainant concerning its transportation situation (R. 303). The survey extended from January 2, to May 5, 1948, and the interviews made during this survey were detailed (R. 304-307). In the past year witness said he examined the records of the Southern Pacific showing shipments by complainant and shipments by other shippers along Southern Pacific lines, consisting of the original car orders of the Southern Pacific Company covering the period between July 1 to September 30, 1947, and going back to January 1, 1947, on some of the records (R. 307-309). Included therein he examined the car order records relating to complainant's plant at Oakland, Oreg., covering January 1 to September 30, 1947, and he had prepared a tabulation from these original records showing cars ordered, dates ordered, dates

wanted, cars received, and date of reception for this period (R. 309). He prepared a similar statement for the loads of the Jones Lumber Company, Portland, Oreg., the Guistina Lumber Company, Eugene, Oreg., for the period July 1 to September 30, 1947; for the Zellner Lumber Company, Eugene, Oreg., for the same period; for the Eugene Fruit Growers, Eugene, Oreg., for the same period; with respect to the shipments of the Oregon Pulp & Paper Company, Salem, Oreg., for the same period; for Interstate Terminals, Portland, Oreg., for the same period; all taken from Southern Pacific car orders and showing Southern Pacific car service at each of those plants (R. 309-312). The record of Jones Lumber Company from the period July 1 to July 30, 1947, shows but few cars that run over two days of receiving a car after being ordered (R. 312). Delivery to the Guistina Lumber Company was also, for that period, in such a manner as to make reasonable operation of the plant from the transportation standpoint "reasonably good" (R. 313). The figures show that Zellner Lumber Company was not inconvenienced by lack of delivery of cars. The same is true with respect to Eugene Fruit Growers and Oregon Pulp & Paper Company, as well as Interstate Terminals (R. 313-314). With respect to Martin Brothers Box Company, Oakland, Oreg., from "the period January 1 to the period of July, [1947] the placement on order appears to be satisfactory." From July 22, to be exact, the placement of car orders would average from July 22 to July 31, approximately 4.3 days delay on each car used. In August—incidentally, in July the longest wait for any

one car was 21 days. In August the average delay in placement of cars in the matter of car order days is approximately 8.47 days per car. They had five cars delayed 15 days or more. The longest delay was 19 days. In September they had an average delay of approximately 8.7 days per car order. They had 10 cars delayed 10 days or more. The longest delay was 28 days on one car (R. 315). It was the witness' understanding that telephone orders of the Timber Structures were reduced to writing (R. 321). Looking at Exhibit 8, with respect to the Martin Brothers Box Company, there are some situations that show the cars were wanted on a certain date and were placed on an earlier date. The record also shows car orders in the Martin Brothers Box Company books of orders that showed more than the number of cars ordered placed (R. 324); some of the car orders were signed and some were unsigned (R. 325). Some of the cars for Timber Structure Company to a considerable extent during July, August, and September 1947, were appropriated cars that came in under load (R. 326).

At Eugene, Oreg., he had more trouble getting empty cars for the Timber Products plant than he did at Portland, Eugene being a competitive point. None of the companies referred to manufacture wire-bound boxes to his knowledge (R. 327-328). The records show that from January 1 to September 30, 1947, Martin Brothers received a few cars every day (R. 328) and the average delay in placing the car was the figure given on the exhibit (R. 329). In figuring those averages witness gave consideration to

the cars that were placed ahead of the date they were ordered (R. 330).

Witness Zebulski, presently employed as treasurer by the Martin Brothers Box Company, Toledo, Ohio (R. 348), testified that his estimate of full car requirements, 42 cars a week (R. 363), was based upon a two-shift operation for the box plant, and one shift for the sawmill (R. 364).

Mr. Hugo Erdman, Toledo, Ohio, assistant to the president of the Martin Bros. Box Co. (R. 392), introduced and testified with respect to Exhibit 11, showing the different commodities manufactured at the Oakland plant and the cars required in those operations (R. 394); also showing the cars actually furnished (R. 400). The minimum number of cars required by Martin was 8.4 cars per day (R. 401). The exhibit shows the cars shipped to the Toledo plant during the complaint period (R. 425-426). It reflects every car furnished the Martin company for shipment from Oakland (R. 429).

Mr. L. P. Hopkins, an employee of the Southern Pacific Company, testified that they gave the track capacity of the plant of Martin Bros. at Oakland, Oreg., as 25 cars (R. 423).

Mr. E. C. Poole, manager, Bureau of Transportation Research of the Southern Pacific Company (R. 439), introduced a number of exhibits with respect to freight cars ordered built and owned, freight cars delivered to all railroads in the United States (R. 444-445). There was a shortage of cars in 1947 (R. 446). His Exhibit No. 15 shows carloads of revenue freight carried by the Southern Pacific Com-

pany (R. 447-448). In 1947, compared with 1945, there was in excess of 100,000 less carloads made empty on the Southern Pacific which it had received from its connections (R. 449). Exhibit No. 16 shows the interchange of tonnage at Portland, Oreg., with railroad connections for the period 1927 to 1948. The significant thing is that the traffic both received and delivered had a very great increase (R. 451). The car shortage was due to the fact that the greater number of cars are delivered to connections loaded than received and empties must be secured to make up the gap (R. 452). The witness testified that prior to the war, the trend of tonnage was eastward and westward during the Pacific war. The trend reversed itself immediately after the war (R. 454-456).

His Exhibit No. 20 shows freight cars ordered from 1940 to January 1, 1950, from the Southern Pacific Company, which numbered 32,913 (R. 460). An exhibit introduced by this witness also showed the large increase in industries located on the lines of the Southern Pacific (R. 465-466). The effect of the 5-day workweek in industry generally on freight car supply was shown (R. 468-469).

Mr. B. T. Ayers, superintendent of freight-car service, Southern Pacific Company (R. 501), testified with respect to freight-car shortage during the complaint period in 1947 both Nation-wide and with respect to the Southern Pacific (R. 503-504).

Exhibit No. 30 shows the increase in demand for cars during the complaint period in 1947 compared with the same period in 1946 (R. 505-506). That increase on the Portland Division was 31,960 cars.

During the complaint period the railroad was short boxcars, flatcars, and gondolas, which is the type of car used generally for lumber loading (R. 506-508).

Exhibit No. 34 relates to orders permitting the substitution of refrigerator cars in lieu of boxcars (R. 511-513). The strike of Southern Pacific engineers on July 21, 1947, had an effect on Southern Pacific cars because the shippers had, anticipating a strike on the Southern Pacific, moved their freight via other lines. The effect of that was felt by the Southern Pacific for more than 3 or 4 weeks (R. 515-516). Mr. Ayers also testified with respect to certain restrictions as to loading cars to certain destinations (R. 517-518).

Mr. L. P. Hopkins, superintendent of the Portland Division, Southern Pacific Company (R. 532), described the through freight-train operations as they existed in 1947 on that division (R. 537-540). He also described the local freight-train operations on the Portland Division (R. 541-543). He testified with respect to the location of lumber mills and shippers located on the Southern Pacific and its short line connections, dependent on the Southern Pacific for freight cars (R. 543-546; and the advantages a shipper has in being located in the switching yards of a railroad terminal involving the speed in which car loaders may be supplied over shippers not so located were depicted (R. 550-551). There was no more delay on the Southern Pacific in furnishing cars to shippers at noncompetitive points than at competitive points (R. 552-554). On the Portland Division there was a car

shortage, off and on; on the Southern Pacific in the first 9 months of 1947; the most serious shortage was from July until the latter part of October in 1947 (R. 555-556).

Mr. G. M. Leslie, chief clerk to superintendent of the Portland Division, Southern Pacific Company (R. 558), exercising general supervision over the distribution of empty equipment, was familiar with the car shortage which took place in 1947 on the Southern Pacific, Portland Division (R. 559-560). He described the formula for determining the number of cars shippers would be entitled to during the period of shortage which was based on the cutting capacity of the sawmill in an 8-hour period and the capacity of a mill to load a certain number of cars in an 8-hour day, as well as the supply of cars available for distribution and car orders filed with the carrier by the mill (R. 561-564). They would not furnish cars to a mill if there were no car orders on file. Witness stated that during the car-shortage period of 1947, he applied the formula after July 1, 1947, to all lumber shippers on the Portland Division, including Martin Brothers. The formula was not in effect prior to July 1, 1947, because the car shortage was not of sufficient severity to require it (R. 565-566).

Mr. R. J. Robinson, special clerk, Bureau of Transportation Research, Southern Pacific Company, whose function it is to make studies of transportation problems, etc., came to Oregon after this complaint was filed and made a study of the car orders of Martin Brothers on file with the agent at Oakland. He abstracted the car orders of the Martin Brothers by

order number, dates, type of equipment ordered, type of equipment furnished, car number, and the lading shown in those car orders, the results of which are incorporated in Exhibit No. 40, which covers the period January–September, inclusive, 1947 (R. 567). His Exhibit No. 41 is a summary of empty freight cars ordered by Martin Brothers furnished by the Southern Pacific during the complaint period (R. 577). As adjusted it shows a total of 593 cars furnished; 565 cars ordered (R. 578). Those car orders were generally furnished by R. L. Stapleton, but some of them had no signature. Percentage of the cars furnished for the 9-month period compared with cars ordered are detailed (R. 579–580). His Exhibit No. 42 is a 26-page statement showing daily yard check of freight cars on spur of Martin Brothers during the complaint period (R. 580). One car was held for as long as 8 days; several were held more than 2 days (R. 585–586).

Mr. F. C. Nelson, freight-traffic manager, Southern Pacific Company, Portland, Oreg., occupying that position during the complaint period (R. 591–592), introduced exhibits showing, among other things, the shift in the lumber industry from western Washington to western Oregon (R. 595–596); the growth of new industry on the Southern Pacific and in western Oregon, with its consequent burden on the car supply (R. 599–602). Witness expressed the opinion that Mr. Martin was not being fully informed by his plant of what the actual conditions were in supplying cars (R. 603–605). Representatives of the Box Company gave witness a lot of information as to how many cars

they wanted at Oakland, but he said rarely did he ever get two alike (R. 609-610). Witness told Mr. Holland of that company to be sure and have his people place car orders for the cars as there seemed to be confusion in his organization "as to how many cars they wanted." Holland told witness he wanted 8 cars a day and that reefers and stockcars would be acceptable (R. 610). Witness stated there was a wide fluctuation in the movement of traffic out of the Martin Brothers plant, ranging from as little as 17 cars a month to over 100 cars a month (R. 615). Witness testified as to complaints received from other lumber shippers, stating that there were some complaints registered in the early part of the year when they had a car shortage but it was not as severe as it was from July to October of 1947 (R. 616). In the conversation the witness had with Mr. Holland in August of 1946 (R. 630), he stated Mr. Holland said he would be willing to accept refrigerator cars and stockcars and witness explained to him that it was necessary to place car orders for those, too (R. 630-631). Witness stated that the railroad was trying to "make the car supply stretch as far as we could while we were in difficulty," and that it didn't have sufficient cars to supply the lumber industry or other shippers in Oregon (R. 631).

Mr. A. M. Bogen, Oakland agent of the Southern Pacific in 1947 (R. 634), said he frequently went over to the Martin Brothers plant to check the yard. Practically all of the orders he received were brought in by *R. L. Stapleton* (R. 636-637). Usually *Mr. Stapleton* had the car orders made out before he came to the

agent's office; he would generally have the car orders made out before he got there, although sometimes he would make the orders right at the depot (R. 638). Most of the time the railroad agent at Eugene knew what cars Martin Brothers would have, and many calls were made there to find out how many cars were going to be placed, and then an order would be placed (R. 638-639).

In addition to this evidence, 48 exhibits were introduced by the various witnesses in support of their testimony.

As the Supreme Court said in *Interstate Commerce Commission v. Jersey City*, 322 U. S. 503, 513:

With that sort of evidence before them, rate experts of acknowledged ability and fairness, and each, acting independently of the other, may not have reached identically the same conclusion. We do not know whether the results would have been approximately the same. For there is no possibility of solving the question as though it were a mathematical problem to which there could only be one correct answer. Still there was in this mass of facts that out of which experts could have named a rate. The law makes the Commission's finding on such facts conclusive. *Interstate Commerce Commission v. Union Pacific R. Co.*, 222 U. S. 541, 550.

It is clear from the evidence of record, much of which is contained in the foregoing summary, that the Commission's ultimate findings of fact have substantial evidentiary support.

In regard to appellee's allegation that the Southern Pacific had failed to provide it with transportation of

property from Oakland, Oreg., to various destinations upon request therefor and to furnish it with adequate car service, in violation of Section 1 (4) and (11) of the Act (R. 78), the Court's attention is directed to Section 1 (4) which provides that a rail carrier is only required to furnish cars to a shipper upon "reasonable request therefor."

The evidence summarized above shows that there was a critical shortage of cars on the Southern Pacific (as well as on all the other railroads in the country) during the period covered by the complaint, a fact admitted by appellee's president (R. 177-178). The orders for empty cars for transporting lumber on the Portland Division of the Southern Pacific were far in excess of the supply available (R. 446-453, 501-506). The testimony shows that the information given to the Southern Pacific by the employees of appellee as to the need for cars was conflicting (R. 609-610) and that the railroad's representative told Mr. Holland, sales representative of appellee, that it was necessary for the shipper to place definite car orders so as to remove the confusion as to its needs (R. 610). The testimony shows that the evidence is conflicting as to the number of cars required from day to day by appellee and it is clear that it was the practice of the Southern Pacific to furnish cars to the shippers of lumber in Oregon, including appellee, when clear and definite orders for placing were received. It is also clear that the railroad did not require that written orders be placed and that oral orders were honored when clear and definite (R. 589-590) as to appellee's daily need. It is submitted that this policy of the railroad meets with the requirement of Section 1 (4)

with respect to the duty to furnish cars upon reasonable request.

The reasonableness of the requirement for furnishing cars only on specific orders is apparent when consideration is taken of the railroads' car demurrage rules and regulations which would not allow the collection of demurrage charges on cars placed by a railroad, no matter how long held by the shipper, if furnished in the absence of a specific order therefor. It is submitted that a prerequisite to the duty of a carrier, under Sec. 1 (4), to furnish cars is that specific day to day orders should be made.

The evidence shows that due to the critical car shortage and the emergency conditions prevailing in connection therewith that the Southern Pacific attempted to prorate the cars between shippers of lumber so that there may be an equitable distribution of the available supply. In this endeavor it appears that the Southern Pacific attempted to furnish every available car that could be used by appellee (in addition to boxcars) including gondolas, flatcars, reefers, and refrigerator cars, which appellee agreed to accept and used for the transportation of its products.

The railroad also devised a formula for determining the number of cars shippers would be entitled to during the most severe period of the shortage, which was after July 1, 1947 (R. 561-566). The record shows that appellee was furnished all the cars for which it placed specific orders during the nine-month period covered by the complaint (Exhibit 8, R. 324).

It is respectfully submitted that the evidence of record shows that in numerous instances the orders placed by appellee with the Southern Pacific for cars,

during the complaint period, were not definite and specific as to the number needed and they were indefinite as to the dates on which to be furnished. The evidence on the record as a whole amply and fully supports the Commission's ultimate finding that appellee failed to establish that the Southern Pacific engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Act in furnishing or not furnishing cars to appellee during the period January 1 to September 30, 1947.

III

The evidence supports the Commission's finding that the Southern Pacific did not subject appellee to any undue prejudice in violation of Section 3 of the Act

In the complaint proceedings before the Commission it was alleged that the Southern Pacific had failed to provide car service from complainant's Oakland, Oreg., plant in the same proportion to its actual requirements as were provided to other shippers on the railroad's line (R. 78-79), and that such failure subjected complainant (appellee herein) to undue and unreasonable prejudice and disadvantage in violation of Section 3 of the Act (R. 80). In regard to this allegation the Commission found that appellee failed to establish a Section 3 violation. That this ultimate finding of fact is supported by substantial evidence will readily appear by reference to the testimony of record, much of which is to be found in the summary of evidence contained in Chapter II, *supra*.

The evidence shows that shippers on the Portland Division of the Southern Pacific, other than appellee,

had experienced delays in receiving cars. Witness Nelson, Freight Traffic Manager of the Southern Pacific, testifying as to the car shortage situation stated that the railroad had received numerous complaints from other lumber shippers during the period from January 1 to September 30, 1947. He stated, in response to the following questions of counsel: (R. 616.)

Q. Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30, inclusive, 1947?

A. Yes; we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers.

Witness Hopkins, Superintendent of the Southern Pacific's Portland Division, testified that there was no more delay in furnishing cars to shippers at noncompetitive points than at competitive points (R. 552-554).

The evidence also shows that during the complaint period appellee's treatment in the matter of being furnished cars was no better or worse than other shippers of lumber in the area. They were all placed on the same basis as the railroad pro rated the cars in accordance with a formula which was used to determine the number of cars shippers were entitled to receive during the most critical, shortage period, beginning on July 1, 1947 (R. 561-566).

The evidence further shows that no lumber mill was furnished with more cars than for which the Southern Pacific had received specific oral or written daily orders (R. 565); that appellee was furnished with all cars during the complaint period for which it placed specific oral or written orders, and that there were times in which appellee received more cars than ordered and that some cars were placed earlier than the date for which ordered (R. 324).

Such evidence as the above clearly refutes appellee's charge of undue and unreasonable prejudice and disadvantage to it by a failure of the Southern Pacific to provide car service from its Oakland plant in the same proportion to its actual requirements as provided other shippers on the railroad's line.

The record also fails to show that appellee was subjected to competition since it produced only wire-bound boxes and was not engaged in the sale of lumber

as such. In the absence of proof of competition an allegation of undue prejudice and preference cannot be sustained. *Americus & Co. v. Pennsylvania R. R. Co.*, 181 I. C. C. 5, 10; *California Cotton Oil Corp. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 97, 105; *Traffic Bureau, Lynchburg Cham. of Com. v. C. & O. Ry. Co.*, 234 I. C. C. 765, 768.

It is respectfully submitted that the Commission's finding that appellee had failed to establish that the Southern Pacific had subjected it to any undue prejudice, in violation of Section 3, is supported by substantial evidence.

The record in the Commission proceedings fails to reveal that appellee is entitled to an award of reparations. There is an utter lack of proof of damages.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed, and the case remanded with instructions that the Court enter a judgment sustaining the Commission's report and order, and that the cause be dismissed.

EDWARD M. REIDY,
Chief Counsel.

SAMUEL R. HOWELL,
Assistant Chief Counsel.

WILLIAM L. HARRISON,
Attorney.



No. 14,077

IN THE
United States
Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY, a
corporation,
Appellee.

Brief for Appellant
Southern Pacific Company

FILED

APR - 9 1954

PAUL P. O'BRIEN
CLERK

JAMES C. DEZENDORF,
GEORGE B. CAMPBELL,
800 Pacific Building,
Portland 4, Oregon

JAMES E. LYONS,
CHARLES W. BURKETT, JR.,
65 Market Street,
San Francisco 5, California
*Attorneys for Appellant
Southern Pacific Company*



SUBJECT INDEX

	Page
Statement as to Jurisdiction.....	1
Statement of the Case.....	2
Specification of Errors.....	8
Summary of Argument.....	8
Argument	10
A. The Only Question to Be Determined By the District Court Was Whether There Was Any Substantial Evidence to Support the Commission's Findings of Ultimate Fact	10
B. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding that Southern Pacific Did Not Engage in Any Unreasonable Practice in Violation of Section 1 of the Interstate Commerce Act.....	16
C. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding that Southern Pacific Did Not Subject Martin Brothers to Any Undue Prejudice	45
D. The Record Contains Substantial Evidence that Martin Brothers Did Not Suffer Damages as Alleged.....	47
Conclusion	52

TABLE OF AUTHORITIES

CASES	Pages
Assigned Car Cases, 274 U.S. 564.....	12, 13
Board of Trade v. United States, 314 U.S. 534.....	12
Davis v. Cornwell, 264 U.S. 560.....	35
Di Giorgio Importing & S. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425.....	28, 29
Johnston Seed Co. v. United States, 191 F.2d 228.....	14
Koepp v. New Orleans G. N. R. Co., 162 La. 487, 110 So. 729	25, 27, 28, 36
Manufacturers Ry. Co. v. United States, 246 U.S. 457.....	11
Meeker & Co. v. Lehigh Valley R. Co., 236 U.S. 412.....	14
Midland Valley R. Co. v. Excelsior Coal Co., 86 F.2d 177.....	14
Mills v. Lehigh Valley R. Co., 238 U.S. 473.....	14
Morrisdale Coal Co. v. Pennsylvania R. Co., 230 U.S. 304.....	14
Nashville Ry. v. Tennessee, 262 U.S. 318.....	11, 12
New York Cent. Securities Corp. v. United States, 287 U.S. 12	33
Pennsylvania R. Co. v. International Coal Co., 230 U.S. 184....	51
Pennsylvania R. Co. v. Puritan Coal Min. Co., 237 U.S. 121....	14
Sample v. Atehison, T. & S. F. Ry. Co., 139 I.C.C. 324.....	31
Simmons v. Seaboard Air Line Ry., 133 Ga. 635, 66 S.E. 783	26, 27, 28
St. Louis, etc. Ry. Co. v. Brownsville Dist., 304 U.S. 295.....	14
Swift & Co. v. United States, 316 U.S. 216.....	12
United States v. Chicago Heights Trucking Co., 310 U.S. 344..	12
United States v. Interstate Com. Commn., 198 F.2d 958, cert. den. 344 U.S. 893.....	2
United States v. Minnesota, 270 U.S. 181.....	33
Victor-American Fuel Co. v. Denver & S. L. R. Co., 115 I.C.C. 169	23, 32

	Pages
Virginian Ry. Co. v. United States, 272 U.S. 658.....	12, 13
Vulcan Coal & M. Co. v. Illinois Cent. R. Co., 33 I.C.C. 52.....	16
Western Papermakers Chem. Co. v. United States, 271 U.S. 268	11
Winter's Metallic Paint Co. v. Chicago, M., St. P. & P. Ry. Co., 87 I.C.C. 113.....	31
Woolley Co. v. Southern Ry. Co., 96 I.C.C. 161.....	30

TEXTS

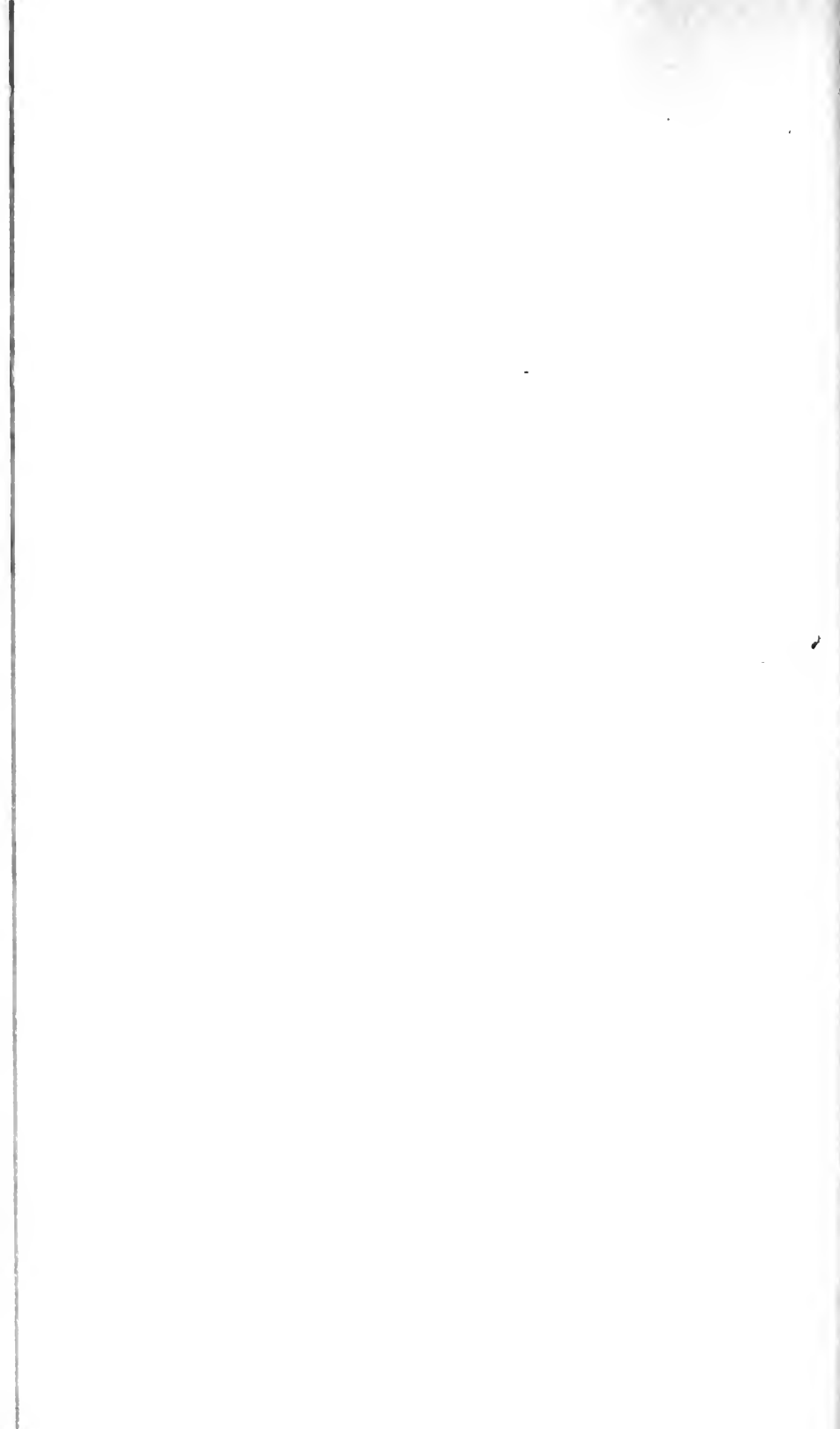
American Jurisprudence, Vol. 9, Carriers, § 336.....	24
Corpus Juris Secundum, Vol. 13, Carriers, § 37a.....	24

STATUTES

United States Code:	
Title 28, Sec. 225	2
Sec. 345	2
Sec. 1336	2
Sec. 2331	2
Title 44, Sec. 307	19
Title 49, Sec. 1(4)	10
Sec. 1(11)	10
Sec. 3	10

INTERSTATE COMMERCE COMMISSION REGULATIONS

Regulations to Govern the Destruction of Records of Steam Railroads, Item 161 (33 CFR, 1945 Supp., 5.7, § 110.12, p. 4511)	18
--	----



No. 14077

IN THE
United States
Court of Appeals

For the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,	}
<i>Appellants,</i>	

v.

THE MARTIN BROTHERS BOX COMPANY, a corporation,	}
<i>Appellee.</i>	

**Brief for Appellant
Southern Pacific Company**

STATEMENT AS TO JURISDICTION

This appeal is from a judgment rendered by the District Court of the United States for the District of Oregon in an action commenced in that court by appellee, The Martin Brothers Box Company, a corporation, to set aside an order of appellant Interstate Commerce Commission which dismissed a complaint seeking an award of reparation from appellant Southern Pacific Company.¹ As appears from the

1. The parties are herein referred to at times as Martin Brothers, the Commission, and Southern Pacific, respectively. In various quotations Martin Brothers is referred to as complainant and Southern Pacific as defendant.

amended petition filed by Martin Brothers with the District Court (R. 3), the jurisdiction of that court was invoked under Sections 1336 and 2331, Title 28, United States Code, *inter alia*.

The jurisdiction of the Court of Appeals to review the judgment of the District Court (R. 74) is based upon Section 225, Title 28, United States Code, it being a final decision in the District Court, a direct review of which may not be had in the Supreme Court under Section 345, Title 28, United States Code. Jurisdiction to review the judgment of a district court in the same type of action was exercised by the Court of Appeals in *United States v. Interstate Com. Commn.* (C.A., D.C. 1952), 198 F.2d 958, cert. den. 344 U.S. 893.

STATEMENT OF THE CASE

Martin Brothers, on October 14, 1947, filed with the Commission a complaint alleging that between January 1, 1947, and September 30, 1947 (a period of general car shortage), Southern Pacific failed to furnish it with adequate cars for the transportation of property (wire-bound boxes, veneer and lumber) from Oakland, Oregon, to various destinations in other states, in violation of Sections 1 and 3 of the Interstate Commerce Act. The sole relief sought in the complaint was an award of reparation in the amount of \$2,259,000 (R. 77). An answer denying the alleged violations of the Interstate Commerce Act was filed with the Commission by Southern Pacific (R. 81).

A four-day hearing on the complaint was held at Portland, Oregon, commencing February 20, 1950, at which time extensive oral and written evidence was received. The case presented by Martin Brothers was based, not on the failure

of Southern Pacific to supply all the cars specifically ordered, but rather on the alleged failure to supply cars not specifically ordered. Martin Brothers' basic contention was that Southern Pacific should have furnished it 8.4 (eight and four-tenths) cars on each working day of the complaint period (R. 775) rather than the number of cars for which Martin Brothers placed specific daily car orders during that period. An examiner's proposed report was issued (R. 84), finding that the complaint period was a time of general car shortage for which Southern Pacific was not accountable (R. 92-94), but recommending that the Commission find that during that period Southern Pacific "failed in its duty to provide and furnish transportation from complainant's plant at Oakland upon reasonable request therefor". The examiner further recommended that Martin Brothers be awarded reparation in the amount of \$135,220.56, with interest (R. 106).

After the issuance of the examiner's proposed report, Martin Brothers and Southern Pacific filed exceptions thereto, and then each subsequently filed a reply to the exceptions of the other. Oral argument was then held before Division 3 of the Commission at Washington, D. C. (R. 656-683). Thereafter, on March 12, 1951, Division 3 issued its report (R. 108) (280 I.C.C. 395) in which it held:

"We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3." (R. 126)

In its report the Commission also made the following subordinate findings, as had the examiner in the proposed report:

"After the close of World War II, the nation as a whole experienced a great industrial development, and during 1947 the nation's railroads experienced, for the first time since 1920, except in the war period, an average daily shortage of cars. During most of the period between World War I and World War II, they had on hand large surpluses of cars, the worst year being 1932 when the average daily surplus amounted to 694,022 cars. During 1947 the national daily shortage was 18,672 cars, and the defendant was individually faced with an average daily shortage of 583 cars of the types used for the transportation of forest products. Because of the sizeable surplus experienced prior to World War II, the nation's railroads, including the defendant, did not anticipate the unusual demand for cars that arose in 1947.

"In addition to the increases in general traffic on the defendant's lines during and after World War II, it also experienced a tremendous increase in forest products traffic. Before World War II western Washington was the principal producing area of softwood-lumber forest products, but during and after the war western Oregon became the principal producing area of these products. By 1947 the softwood lumber production of western Oregon had risen to nearly 6 billion board feet a year, whereas that in western Washington was only about 3 billion board feet. The defendant is the principal carrier in Oregon, and the number of cars loaded with forest products on its Portland division increased from 80,675 in 1939 to 162,418 in 1947.

"Another factor affecting the defendant's car supply in 1947 was a reversal of the main traffic flow over its lines after the war. During the war the main flow was

westward, but with the close of hostilities in the Pacific theater, the main flow became eastward. During 1947 the defendant originated and delivered to its connecting carriers many more loaded cars than it received from such connections. During the war and post-war periods it exerted extensive efforts to conserve and increase its facilities. *On these facts the defendant cannot be held accountable for general car shortages on its lines within the period covered by this complaint.*" (Emphasis supplied.) (R. 116-118)

In its report the Commission made in addition the following subordinate findings and statements of law:

"Complainant alleges violations of section 1(4), section 1(11) and section 3(1) of the Interstate Commerce Act. Under those sections defendant is required, in part, to provide and furnish transportation upon reasonable request; to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and not to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, locality, or territory. The right of a shipper to cars, however, is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands which it had no reason to apprehend would be made and which it could not reasonably have been expected to meet in full. The law exacts only what is reasonable from such carriers, but at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically. *Penna. R.R. v. Puritan Coal Co.*, 237 U.S. 121 and *Midland Valley R. Co. v. Barkley*, 276 U.S. 482. Considering the above, in the light of the facts of this

record, we conclude that complainant has failed to establish any violation of sections 1 and 3 as alleged. Moreover, the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation. Where special damages are sought, the proof thereof must be as definite and certain as would be necessary under established principles of law to support a judgment in court. *Lignum-Vitae Products Corp. v. Alabama G.S.R. Co.*, 268 I.C.C. 599, 608." (R. 125-126)

Contemporaneously with the issuance of its report the Commission entered an order dismissing the complaint of Martin Brothers (R. 127).

Thereupon, Martin Brothers filed with the Commission a petition for reconsideration. Southern Pacific filed a reply to that petition, and on July 30, 1951, the entire Commission by a vote of 10 to 0² denied that petition for reconsideration (R. 128).

On November 27, 1951, Martin Brothers filed with the District Court of the United States for the District of Oregon a petition to enjoin and set aside the order of the Commission dismissing the complaint. That petition named the Commission and the United States as defendants. On February 11, 1952, the District Court duly issued its order permitting Southern Pacific to intervene as a defendant in the action (R. 35). On September 29, 1952, an amended petition was filed by Martin Brothers (R. 3). The trial of the action was based solely upon the record before the Commission, no additional evidence being offered or received on behalf of any party.

The judgment of the District Court entered August 25, 1953, was that the report and order of the Commission of

2. Commissioner Richard F. Mitchell did not participate.

March 12, 1951, denying reparation to Martin Brothers, and the order of the Commission of July 30, 1951, denying reconsideration, be "annulled, vacated, suspended, and set aside" (R. 74). The findings of fact and conclusions of law entered by the Court also on August 25, 1953, adopted by reference its previously issued opinion of May 15, 1953 (R. 40). That opinion (R. 42) does not hold that the Commission's ultimate findings are insufficient in form or that the Commission misinterpreted or misapplied the law; the opinion rather rests on the sole ground that the Commission's report and order have an insufficient evidentiary basis, i.e., that the evidence in the record before the Commission is such as to justify no other order from the Commission than one awarding reparation to Martin Brothers. Therefore, the only questions presented in this appeal are:

(1) Whether the District Court, in considering the adequacy of the evidentiary basis of the Commission's report and order, could properly do more than to determine whether the Commission's findings of ultimate fact are supported by substantial evidence.

(2) Whether the record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

(3) Whether the record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act.

SPECIFICATION OF ERRORS

The errors in the District Court upon which appellant relies are the following:

1. The District Court erred in attempting to weigh the evidentiary facts in the record made before the Commission and failing to limit its function to determining whether the Commission's findings of ultimate fact were supported by substantial evidence.

2. The District Court erred in failing to conclude that the record contains substantial evidence to support the Commission's finding of ultimate fact that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

3. The District Court erred in failing to conclude that the record contains substantial evidence to support the Commission's finding of ultimate fact that Southern Pacific did not subject Martin Brothers to any undue prejudice in violation of Section 3 of the Interstate Commerce Act.

SUMMARY OF ARGUMENT

I

The holdings in the Commission's report, that Martin Brothers failed to establish that Southern Pacific during the complaint period engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Interstate Commerce Act in furnishing or not furnishing cars to Martin Brothers at Oakland, Oregon, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3, are not conclusions of law but are findings of ultimate fact. In reviewing the record before the Commission it is only appropriate for a court to determine whether the record contains substantial evidence to support

such findings of ultimate fact. For a court to do more is in violation of the established doctrine of administrative finality.

II

The record contains substantial evidence to support the Commission's ultimate finding that Martin Brothers failed to establish that Southern Pacific engaged in any unreasonable or otherwise unlawful practice in violation of Section 1. Section 1 makes it the duty of a carrier to furnish cars only upon reasonable request. Martin Brothers failed to make reasonable request for any more cars than it actually received during the complaint period, having received all the cars for which it placed specific oral or written daily car orders. It was the general practice of Southern Pacific to place only cars for which it received specific oral or written daily car orders—a practice of which Martin Brothers had knowledge and which Martin Brothers had been specifically admonished to observe, and did observe by placing specific oral or written daily orders for the cars which it did receive during the complaint period. That general practice is necessary in order to enable a rail carrier efficiently to distribute cars during a period of general car shortage, and is supported by previous decisions of the Commission and the courts.

III

The Commission's finding that Martin Brothers failed to establish that Southern Pacific subjected it to any undue prejudice in violation of Section 3 is supported by substantial evidence. Southern Pacific furnished other shippers with no more cars than those for which they placed specific oral or written daily orders. As Martin Brothers received all the cars for which it placed specific oral or written daily

orders, it received treatment equal to that received by other shippers and was not subjected to any undue prejudice.

IV

The record contains substantial evidence that Martin Brothers was not damaged as a result of receiving less than 8.4 cars on each of its working days comprising the complaint period. During the complaint period Martin Brothers held idle and empty on its spur track an aggregate of some 200 cars for periods ranging from three to eight days (excluding Sundays and holidays). And Martin Brothers showed *by one of its own exhibits* that during the complaint period it cancelled several car orders it had outstanding.

ARGUMENT

A. The Only Question to Be Determined by the District Court Was Whether There Was Any Substantial Evidence to Support the Commission's Findings of Ultimate Fact.

Martin Brothers, in its complaint filed with the Commission, alleged that Southern Pacific failed to provide car service as required in Sections 1(4) and 1(11) of the Interstate Commerce Act, and subjected it to undue and unreasonable prejudice and disadvantage in violation of Section 3 of that Act (49 U.S.C., Secs. 1(4), 1(11) and 3). These allegations, which were denied by Southern Pacific, were determined by the Commission in its report as follows:

“We find that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged, in violation of section 1 of the Act, in furnishing or not furnishing cars to complainant at Oakland, Oreg.; or that defendant subjected complainant to any undue prejudice in violation of section 3.”

It is clear that the aforesaid statements in the Commission's report constitute determinations of questions of fact within the exclusive judgment and discretion of the Interstate Commerce Commission as confided by Congress.

Neither Section 1(4), Section 1(11) nor Section 3 contains any definition of what is reasonable or unreasonable or what constitutes an undue or unreasonable prejudice or disadvantage.³

Accordingly, it has been repeatedly held by the Supreme Court that whether a particular rate, regulation or practice is "reasonable" or "unduly or unreasonably prejudicial or disadvantageous" is a question of fact confided by Congress to the exclusive judgment and discretion of the Interstate Commerce Commission. Findings by the Commission determining such questions are not to be disturbed by the court except upon a showing that they are unsupported by substantial evidence or for some reason amount to an abuse of power. *Manufacturers Ry. Co. v. United States* (1918), 246 U.S. 457, 481; *Nashville Ry. v. Tennessee* (1923), 262 U.S. 318, 322; *Western Papermakers Chem. Co. v. United States*

3. Section 1(4) provides:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, * * *."

Section 1(11) provides:

"It shall be the duty of every carrier by railroad subject to this part to furnish safe and adequate car service and to establish, observe, and enforce just and reasonable rules, regulations, and practices with respect to car service; and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful."

Section 3 provides:

"It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, * * * in any respect whatsoever; or to subject any particular person, * * * or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: * * *."

(1926), 271 U.S. 268, 271; *Virginian Ry. Co. v. United States* (1926), 272 U.S. 658, 665-666; *Assigned Car Cases* (1927), 274 U.S. 564, 580-581; *United States v. Chicago Heights Trucking Co.* (1940), 310 U.S. 344, 352-353; *Board of Trade v. United States* (1942), 314 U.S. 534, 546; *Swift & Co. v. United States* (1942), 316 U.S. 216, 230. The following quotations illustrate applications of this doctrine of administrative finality:

“The Interstate Commerce Act does not attempt to define an unlawful discrimination with mathematical precision. Instead, different treatment for similar transportation services is made an unlawful discrimination when ‘undue,’ ‘unjust,’ ‘unfair,’ and ‘unreasonable.’ And the courts have always recognized that Congress intended to commit to the Commission the determination, by application of an informed judgment to existing facts, of the existence of forbidden preferences, advantages and discrimination.”

United States v. Chicago Heights Trucking Co., supra, 310 U.S. 344, 352-353.

“Every rate which gives preference or advantage to certain persons, commodities, localities or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by §§ 2 and 3) only that discrimination which is unreasonable, undue, or unjust. *Texas & Pacific Ry. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 219, 220; *Manufacturers Ry. Co. v. United States*, 246 U.S. 457, 481. Whether a preference or discrimination is undue, unreasonable or unjust is ordinarily left to the Commission for decision; and the determination is to be made, *as a question of fact*, on the matters proved in the particular case.

Interstate Commerce Commission v. Alabama Midland Ry. Co., 168 U.S. 144, 170. The Commission may conclude that the preference given is not unreasonable, undue or unjust, since it does not, in fact, result in any prejudice or disadvantage to any other person, locality, commodity or class of traffic."

Nashville Ry. v. Tennessee, *supra*, 262 U.S. 318, 322.

"The finding of reasonableness, like that of undue prejudice, is a determination of a fact by a tribunal 'informed by experience'. *Illinois Central R.R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454. *This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it. Interstate Commerce Commission v. Union Pacific R.R. Co.*, 222 U.S. 541." (Emphasis supplied.)

Virginian Ry. Co. v. United States, *supra*, 272 U.S. 658, 665-666.

"It is not for courts to weigh the evidence introduced before the Commission. *Western Papermakers' Chemical Co. v. United States*, 271 U.S. 268, 271; or to enquire into the soundness of the reasoning by which its conclusions are reached, *Interstate Commerce Commission v. Illinois Central R.R. Co.*, 215 U.S. 452, 471; *Skinner & Eddy Corporation v. United States*, 249 U.S. 557, 562; or to question the wisdom of regulations which it prescribes. *United States v. New River Co.*, 265 U.S. 533, 542. These are matters left by Congress to the administrative 'tribunal appointed by law and informed by experience.' *Illinois Central R.R. Co. v. Interstate Commerce Commission*, 206 U.S. 441, 454."

Assigned Car Cases, *supra*, 274 U.S. 564, 580-581.

The doctrine of administrative finality has been specifically applied to decisions of the Interstate Commerce Commission, respecting car supply and distribution. *St. Louis, etc., Ry. Co. v. Brownsville Dist.* (1938), 304 U.S. 295, 301; *Pennsylvania R. Co. v. Puritan Coal Min. Co.* (1915), 237 U.S. 121, 134; *Midland Valley R. Co. v. Excelsior Coal Co.* (C.C.A. 8, 1936), 86 F.2d 177, 181. Particularly the question of reasonableness of a rule of car distribution is administrative in character, calling for the exercise of the specialized powers and discretion conferred by Congress upon the Commission. *Morrisdale Coal Co. v. Pennsylvania R. Co.* (1913), 230 U.S. 304, 313.

The District Court, however, in its opinion, after describing the findings of ultimate fact made by the Commission as "legal conclusions", proceeds to determine whether they are proper by purportedly analyzing and evaluating various statements of *evidentiary* facts set forth in the Commission's report (which the Court incorrectly describes as "findings").⁴ The Court thus not only attempts to weigh evidentiary facts but fails to consider any evidence of record not specifically set forth in the Commission's report. No court has ever held that, in determining whether the findings of an administrative agency have evidentiary support, the reviewing court should look only to the evidence set forth in the report of the administrative agency. The rule of that judicial review is, rather, reflected in the court's opinion in *Johnston Seed Co. v. United States* (C.A.

4. The Supreme Court has emphasized that the essential content of a report of the Commission consists of the findings of *ultimate* fact and not its mere statements of *evidentiary* or primary facts. *Meeker & Co. v. Lehigh Valley R. Co.* (1915), 236 U.S. 412, 427; *Mills v. Lehigh Valley R. Co.* (1915), 238 U.S. 473, 477.

10, 1951), 191 F.2d 228, in which the court upheld a decision of the Interstate Commerce Commission denying an award of reparation. The court there said (p. 231) :

“Complaint is made that the findings of the Commission were directly contrary to the evidence, and were arbitrary and capricious. The argument in support of the contention is that the finding that the rates charged on mung beans were not shown to have been unreasonable is contrary to the evidence. In view of the dissimilarity among cases of this kind involving reparation, no good purpose would be served by detailing the evidence at length. *The finding was in the nature of a factual conclusion based upon an evaluation of the entire record. It was not a finding susceptible of demonstration with arithmetical exactness by specific reference to uncontroverted evidence. But it represented the considered judgment of the Commission.* We are unable to say that it was contrary to the evidence, that it was not adequately supported by substantial evidence, or that it was arbitrary or capricious. And in a proceeding of this kind it is not the province of the court to substitute its judgment for that of the Commission in respect to a question of this nature. Expediency or wisdom of the order are not elements for consideration. *The field for exertion of the judicial function is exhausted when it appears that there was rational basis for the intelligent finding or conclusion of the Commission.* [Citing cases.]” (Emphasis supplied.)

It is therefore clear that the District Court erred in attempting to do more than merely determine whether there was any substantial evidence to support the Commission's findings of ultimate fact. We shall now demonstrate that each of the Commission's findings of ultimate fact is supported by substantial evidence.

B. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding that Southern Pacific Did Not Engage in Any Unreasonable Practice in Violation of Section 1 of the Interstate Commerce Act.

The Commission's finding of ultimate fact respecting the alleged violation of Section 1 was "that complainant has failed to establish that defendant during the complaint period engaged in any unreasonable or otherwise unlawful practice, as alleged in violation of Section 1 of the Act in furnishing or not furnishing cars to complainant at Oakland, Oreg." The record contains substantial evidence to support this finding of ultimate fact.

The alleged violation of Section 1 was pleaded as follows by Martin Brothers in its complaint filed with the Commission (par. III):

"That the defendant has failed to provide complainant with transportation of property from Oakland, Oregon, to various destinations *upon reasonable request* therefor and to furnish adequate car service to complainant in violation of Section 1(4) and (11) of the Interstate Commerce Act." (Emphasis supplied.)

This statement by Martin Brothers in its complaint is consistent with the Interstate Commerce Act, which clearly makes the placing of a reasonable request with a common carrier a condition precedent to a person's right to be furnished transportation. Section 1(4) provides:

"It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, * * *."

And so the Commission stated at an early time in *Vulcan Coal & M. Co. v. Illinois Cent. R. Co.* (1915), 33 I.C.C. 52, 64:

“However, it is not a carrier’s duty to furnish all cars demanded at all times. In substance section 1 provides that *upon reasonable request* it shall be the duty of every carrier to furnish cars.” (Emphasis by the Commission.)

The Commission, in the cited proceeding, also said (p. 64):
“* * * one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the Commission alone can take original jurisdiction.”

The record contains substantial evidence that Martin Brothers made no “reasonable” requests for the furnishing of any more cars than it actually received during the nine-month complaint period. Criteria of what is a “reasonable” request for the furnishing of cars consist of the general practice followed by shippers in ordering cars, the enforcement of car demurrage rules, the practical factors of car distribution, and previous decisions of the Interstate Commerce Commission and the courts. All of these criteria establish that, to be reasonable, requests for cars should be sufficiently specific to reveal to the rail carrier the exact number and type of cars desired by the maker of the request on a particular day.

It was not, and is not, the practice of Southern Pacific to furnish cars, either to shippers in general or to lumber shippers in Oregon in particular, in response to general advance statements or representations made by shippers concerning their potential shipping capacities or their probable future shipping needs. The record shows that specifically during

the complaint period the general practice of Southern Pacific was to furnish cars to lumber shippers in Oregon only if it had received an "order" for the placing of a definite number and type of cars on a particular day. Witness G. M. Leslie, Car Service Agent of Southern Pacific Company for the Portland Division,⁵ testified that cars would be furnished only after car orders had been placed (R. 565); and Martin Brothers in its own exhibits showed that six other Oregon lumber shippers,⁶ as well as Martin Brothers itself, received only cars for which they had placed specific car orders (R. 704-759).

During the complaint period there was no requirement that car orders had to be in writing, and it was the practice of shippers to place their specific, day-to-day orders orally as well as in writing. Shippers submitting their orders in writing had available for that purpose pads of printed car-order forms distributed by Southern Pacific. When shippers submitted car orders orally, the orders were reduced to writing on these forms by the agent of Southern Pacific receiving them (R. 589-590). The reduction of oral car orders to writing by rail carriers is contemplated in the rules prescribed by the Interstate Commerce Commission, effective June 1, 1945, in *Regulations to Govern the Destruction of Records of Steam Railroads*, Item 161 of which requires that "Records of Cars Ordered, Furnished and

5. The Portland Division includes practically all the Oregon lines of Southern Pacific upon which lumber shippers are located.

6. Jones Lumber Company, Portland, Oregon; Guistina Lumber Company, Eugene, Oregon; Zellner Lumber Company, Eugene, Oregon; Eugene Fruit Growers, Eugene, Oregon; Oregon Pulp & Paper Company, Salem, Oregon; Interstate Terminals, Portland, Oregon.

Loaded" be retained three years, and "Reports of Unfilled Orders" be retained one year.⁷

The record further shows that Martin Brothers itself followed the practice of placing specific day-to-day orders, either in writing or orally by telephone, for cars during the complaint period (R. 589). Most of the written orders placed by Martin Brothers were executed on the printed car-order forms by its employee Mr. R. L. Stapleton at the offices of Martin Brothers, *prior to his receiving any information as to what cars might be available*, and then delivered to the agent of Southern Pacific at Oakland (R. 638).

Not only does this conformity by Martin Brothers with the general practice of placing specific orders for cars establish a definite knowledge of Martin Brothers of the car-order practice and an acquiescence by Martin Brothers in that practice, *but the record shows that prior to the complaint period Martin Brothers was expressly admonished to place specific car orders*. Witness F. C. Nelson, Freight Traffic Manager of Southern Pacific at Portland, Oregon, testified that, in an extended conversation respecting the car-supply situation, held at his office in August, 1946, with Mr. R. G. Holland, representing Martin Brothers, he specifically told Mr. Holland "to be sure to have his people place car orders for the cars" (R. 610). This statement was not denied by Mr. Holland, who appeared as a witness at the hearing (R. 275), and stands completely uncontradicted.

Unless requests for the furnishing of cars are sufficiently specific to reveal the exact number and type of cars required

7. This order was published in the Federal Register (33 CFR, 1945 Supp., 5.7, § 110.12, p. 4511) and is thus subject to judicial notice (44 U.S.C., § 307).

by a shipper on a particular day, it would not be possible to enforce effectively car demurrage rules. If a rail carrier were required to place empty cars in the absence of specific car orders, on the mere basis of the shipper's general potential need, and it then developed that such shipper did not actually need those cars, the rail carrier would have no right to collect demurrage and "nonuse" charges.⁸ The relationship between car orders and accrual of demurrage charges was described by witness R. J. Robinson as follows (R. 587):

"Q. [By Mr. Schafer] I note throughout this sheaf of original car orders⁹ notations in blue pencil; you don't know who put those notations in there, do you?"

A. I believe the auditors of the Pacific Car Demurrage Bureau—they are required to go to the various

8. Although not of record in this case, it is undisputed, and a matter of public record, that the applicable demurrage tariff provides that demurrage charges do not accrue on empty cars that are placed on a shipper's special track *until those cars have been specifically ordered by the shipper* (Rules Nos. 1 and 6 of B. T. Jones' Tariffs Nos. 4-Y and 4-Z on file with the Commission, I.C.C. Nos. 3963 and 4257). So, also, there is tariff provision that when empty cars are placed pursuant to order at points in Oregon and not used, "the party ordering same will be subject to a charge of \$9.66 per car when moved from another station, or \$4.45 per car when moved from a point within yard limits." (Item 1590 of Southern Pacific Company Terminal Tariff No. 230-K on file with the Commission, I.C.C. No. 4960.)

If a rail carrier were to place empty cars on the basis not of specific car orders but rather of the potential and fluctuating manufacturing capacity of a particular shipper, that shipper would be able to escape the payment of these demurrage and "nonuse" charges, the result of which would be to handicap seriously the efforts of rail carriers to secure a maximum use of equipment.

9. This reference by counsel for Martin Brothers was to the printed car-order forms which were physically present in the hearing room and upon which the car orders actually placed by Martin Brothers were reduced to writing, by Martin Brothers' employees (if placed in writing) or by Southern Pacific's agent (if placed orally).

stations on the railroad and check the preparation of the car demurrage sheets and also the underlying documents of the car orders to see that agents are complying with the preparation of those documents. I believe that was an auditor's marks."

Requiring a rail carrier to furnish cars on a basis other than specific car orders would seriously handicap the rail carriers in distributing cars from a practical viewpoint. A railroad company is a large organization composed of thousands of employees and serving thousands of different shippers. One employee of a carrier might be told one thing at one time, and another employee might be told another thing at another time. For a request for cars to be reasonable it should be made through the recognized channels in which cars are regularly ordered each day.

Moreover, it is not only uncontroverted but alleged that the complaint period was a time of general car shortage for which Southern Pacific was not responsible. We say uncontroverted because the findings of evidentiary fact to that effect by the Commission (reproduced *supra*, pp. 4-5) were originally made by the Examiner in his proposed report and yet no exceptions or objections to those findings were ever registered by Martin Brothers, either in its exceptions or petition for reconsideration before the Commission, or in the proceedings filed with the District Court. In such a period of general car shortage a rail carrier is inevitably subjected to continual and inflated demands for cars by all shippers. The record shows that Southern Pacific, during the complaint period, actually received "thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise," from other lumber shippers respect-

ing the car shortage (R. 616). In such circumstances, it was particularly necessary that bona fide orders for cars be placed through the definite and recognized channels in which cars were regularly ordered each day, i.e., by the placing of specific oral or written car orders with agents at the station at which the cars were needed for loading. Otherwise Southern Pacific would have been under a serious and substantial handicap in making an efficient and orderly distribution of the limited cars that were available.

Requiring a rail carrier to furnish cars without the placing of specific daily car orders would deny the carrier knowledge of what particular types of cars a shipper might require. In this case, the record shows that Martin Brothers required watertight box cars for the shipment of wire-bound boxes and veneer, but that gondolas or flat cars were acceptable for its shipments of lumber (R. 209). 52.7 percent of the cars furnished Martin Brothers were actually used for the shipment of wire-bound boxes, the balance being used for shipments of rotary-cut lumber and sawn lumber (R. 775). It certainly would be unreasonable, and an inefficient practice, to require a carrier to furnish a shipper one type of equipment for all of its shipments when it appeared that other types of equipment were equally acceptable for 47.3 percent of those shipments. Yet, in the absence of specific daily orders, how could Southern Pacific determine how many of the cars to be furnished Martin Brothers were required to be watertight box cars and how many could be other types of equipment? It is patently unreasonable, particularly in a time of general car shortage, for a shipper to fail to advise a carrier of all types of cars which would be equally acceptable for shipments on a particular day.

If a carrier were required to place cars on the basis of the potential capacity of a shipper and not on the basis of specific car orders, there would undoubtedly be certain days when the shipper would be unable to use all the cars furnished. Plant operations might be curtailed or prevented altogether at particular times by such factors as unfavorable weather conditions, labor disputes, machinery breakdowns or power failures. If a carrier were required to furnish a plant at such times with the full number of cars that the plant had a theoretical capacity to load, it might well result in such cars lying idle while at the same time other shippers in the same locality were unable to secure all the cars they actually needed. It was for this very reason that the Commission, in *Victor-American Fuel Co. v. Denver & S.L.R. Co.* (1926), 115 I.C.C. 169, criticized a carrier for distributing cars on the basis of capacity when that capacity exceeded specific car orders. Indeed, as shown *infra*, at page 48, Martin Brothers, during the 228-day complaint period held, without using, some 200 cars for periods ranging from three to eight days apiece.

A rail carrier should no more be required to furnish particular cars on particular days on the basis of casual advance general estimates of future needs, in the absence of a specific order, than would any other commercial enterprise be required to furnish goods or services in response to such general representations. Certainly, if a person constructing or leasing a building requiring a number of telephones should do no more than notify the telephone company that at some future, unspecified time he would need an unspecified number or type of telephones, such person would be in no position to complain against the failure of

the telephone company to effect the installation without specific request therefor.

The reasonableness of the practice of Southern Pacific of furnishing cars to shippers in general, and to lumber shippers in Oregon in particular, only upon the receiving of an "order" for the placing of a definite number and type of cars on a particular day, is attested by its consistency with the general rule, as expressed in *Corpus Juris Secundum*, that a shipper's request for cars "must be sufficiently specific reasonably to inform the carrier of what it is expected to do" and "must show definitely the number and character of cars desired and the time and place at which they are to be furnished." 13 *C.J.S.* Carriers, § 37a.

The general necessity for and sufficiency of a notice or request for cars is stated as follows in *American Jurisprudence* (9 *Am. Jur.* Carriers, § 336):

"A necessary corollary of the rule that a carrier is allowed a reasonable time within which to supply cars is that the carrier is entitled to reasonable notice of a shipper's demands before it can be held liable for any failure or delay in satisfying them. Accordingly, a shipper cannot hold the carrier liable for a failure to furnish cars, unless he can show that he made a suitable and proper application therefor, which means that he must show not only a tender to, or receipt of property for shipment by, an authorized agent of the carrier or an application to such an authorized agent for a car, but also due compliance with any statutory regulations or any reasonable rules of carriage in respect thereto."

These statements of principle are well supported by decisions of the courts and the Interstate Commerce Commission.

In *Koepp v. New Orleans G.N.R. Co.* (1926), 162 La. 487, 110 So. 729, the plaintiff shipper brought suit to recover damages caused by the alleged failure of the defendant rail carrier to furnish cars required for the transportation of lumber and piling during a particular 10-month period. The trial court awarded a judgment in the plaintiff's favor, but the Supreme Court of Louisiana, in reversing that judgment, said (110 So. 730-731):

"The plaintiff claims, according to testimony offered in its behalf, that after the defendant retook possession of its line of railroad at the termination of government control on March 1, 1920, it placed a standing order with the defendant for four cars daily, and, from time to time, gave special orders for additional cars, running on occasions as high as ten cars a day. This testimony is controverted by the defendant.

We do not think the evidence in the record is sufficient to support the claim of the order by plaintiff of four cars daily. But, if it be conceded that such an order was given, the order itself was too indefinite to serve as the basis of an action for damages for the failure to furnish the cars.

The evidence does not show the kind of cars needed, or how many were required for carrying lumber, or how many were required for carrying piling, a different character of car being required for the transportation of each of said commodities. The nature of the business is such and the duty of furnishing safe cars is such as renders it necessary for railroad companies to know what is to be loaded on the cars so that they can be provided to suit the occasion. Since different cars were needed, defendant was entitled to such reasonable notice of the particular kind and number of each desired as would enable it to supply the demand.

It would be unreasonable to tie up the equipment of a railroad company to respond to the demand for cars by one shipper without regard to a present necessity therefor. When a demand is made upon a carrier for the performance of a public duty, the demand should be specific enough to reasonably inform the carrier of what it is expected to do. See *Simmons v. Seaboard Air Line R. Co.*, 133 Ga. 635, 66 S.E. 783."

In *Simmons v. Seaboard Air Line Ry.* (1909), 133 Ga. 635, 66 S.E. 783, the plaintiff, operator of a sawmill, sought to recover damages from the defendant rail carrier on the ground that it had failed in its duty of supplying cars for the shipment of freight, "thus rendering it impossible for the plaintiff to send 'lumber, wood, and slabs' to his customers." The plaintiff alleged that early in the month of January 1906 he had given defendant's agent a standing order for five cars per day. The court, in holding that this order was too indefinite to provide a basis for a suit for damages for a failure to furnish cars, said (66 S.E. 784):

"It was alleged that the freight to be transported consisted of lumber, wood, and slabs, and that the demand upon the defendant was 'a standing order * * * for five cars per day'; but the order did not specify the character of the cars needed, or how many were required for transporting lumber, or how many for wood, or how many for slabs. It is not alleged that the same character of car would be suited to the purpose of carrying each of the several articles proposed to be loaded on the cars. The character of the business is such, and the duty of furnishing safe cars is such, as renders it necessary for the railroads to know what is to be loaded on the cars, so that they can be provided to suit the occasion. It appears from the petition that lumber, wood, and slabs

are different articles, and it might require different kinds of cars in which to carry them. The petition is to be construed most strongly against the plaintiff; and in view of the demurrer, and the failure to allege that the same cars were suited to carrying all of the commodities, it may be presumed that different kinds of cars were needed. If they were, then the defendant was entitled to such reasonable notice of the particular kind of cars and the number of each desired as would enable it to supply the demand. It would be unreasonable to tie up all the equipment of a railroad company to answer the beck and call of one of its customers, without regard to a present necessity therefor; and when a demand is made upon such company for the performance of a public duty, the demand should at least be so specific as to reasonably inform the company of what it is expected to do."

The District Court attempts to distinguish both the *Koepp* and *Simmons* cases on the ground that the shippers in those cases required different types of cars for the commodities shipped and that in the present case box cars were suitable for all of Martin Brothers' shipments. But, as shown *supra* p. 22, although Martin Brothers required watertight box cars for the wire-bound boxes and veneer constituting 52.7 percent of its shipments, flat cars or gondolas were equally acceptable for the other 47.3 percent of its shipments. Particularly in a time of car shortage, a carrier should be given information as to all types of equipment which would be acceptable for shipments and not limited arbitrarily to one particular type merely because the shipper fails to place specific car orders. To have required Southern Pacific to furnish box cars for shipments

for which flat cars or gondolas were equally acceptable falls within the court's condemnation in the *Koepp* case (110 So. 731):

"It would be unreasonable to tie up the equipment of a railroad company to respond to the demands for cars from one shipper without regard to a present necessity therefor."

Moreover, regardless of the fine factual distinction that might be attempted to distinguish the *Koepp* and *Simmons* cases, they clearly express and apply the rule that a rail carrier's duty to furnish cars is conditioned upon its receiving specific car orders.

In *Di Giorgio Importing & S. Co. v. Pennsylvania R. Co.* (1906), 104 Md. 693, 65 Atl. 425, the plaintiff sought to recover damages for losses alleged to have resulted from the defendant rail carrier's failure promptly to furnish cars for the transportation of fruit. The plaintiff had filed a requisition for cars to be loaded with fruit arriving on certain vessels that were due during the next week, but the defendant rail carrier was not advised of the exact arrival time of the vessels. The court, in affirming a trial court judgment in favor of the defendant rail carrier, held (65 Atl. 429):

"There is no evidence that defendant had notice in fact from the Chamber of Commerce, or from any source, of the approach or expected arrivals of these vessels, and it cannot be held, under the circumstances of this case, to be their duty, to keep some one on watch at the Chamber of Commerce for that purpose. As was said in *Ayres v. Chicago*, 71 Wis. p. 380, 37 N.W. p. 436 (5 Am. St. Rep. 226), 'the plaintiff had no reason to insist upon or expect compliance except upon giving rea-

sonable notice of the time when they would be required. It must be remembered that the defendant has many lines of railroad scattered throughout several distant states, and many stations of more or less importance. * * * No one station, much less any one shipper, has the right to command the entire resources of the company to the exclusion or prejudice of other stations and other shippers. Most of such suitable cars must necessarily be scattered along such different lines of railroad, loaded or unloaded.' ”

Not only does this holding by the court support the propriety of the practice followed by Southern Pacific of furnishing cars to shippers in general, and to Martin Brothers in particular, only upon the receiving of a specific order, but the factual situation in the *Di Giorgio* case was actually more favorable to the shipper there concerned than the factual situation in the present case is to Martin Brothers. The placing of a request for cars upon the arrival of a vessel due the very next week bears more resemblance to a specific request than do the estimates of Martin Brothers (discussed *infra*, p. 37) that 8 to 10 cars per day would be needed “after we get our wire-bound boxes into operation on one shift,” 11 to 13 cars per day “after we get our wire-bound boxes into operation on two shifts,” and 13 cars per day “after we get our wire-bound boxes into operation on three shifts,” particularly when each of those estimates is in direct conflict with other estimates. Just as the court held in the *Di Giorgio* case that it was not the duty of the carrier “to keep someone on watch” to determine the time of arrival of the designated vessels, so also it was not the duty of Southern Pacific to keep someone on watch to determine when Martin Brothers started its wire-bound box

production and whether it was operating on a one-shift, two-shift or three-shift basis.

The Commission decision here under review is fully consistent with the Commission's own previous decisions. Although the District Court attempts to distinguish certain of those decisions on the ground that they "do not even remotely involve the problem before us" (R. 59), the fact is they all express and involve some direct application of the principle that a carrier is not obligated to furnish cars unless it receives a specific request from a shipper.

In *Woolley Co. v. Southern Ry. Co.* (1925), 96 I.C.C. 161, the complainant Woolley Company alleged that it had been damaged as the result of the failure of the defendant rail carrier to furnish its mine with a reasonable car supply during portions of 1922 and 1923. The car records of the defendant carrier showed that during October and November 1922 the Woolley Company regularly placed specific car orders with the defendant. Those records also showed that during the first three days of December 1922 the Woolley Company ordered 14 cars and was furnished 14 cars, and on December 14 ordered a single car, which was furnished. The company's mine was closed on and after December 4, 1922, which it contended was due to an inadequate car supply, and no specific car orders were placed (except the one on December 14). On the basis of these facts the complainant shipper sought damages for the period to and including March 31, 1923, "on the theory that by shutting down the mine it was fulfilling its duty of lessening the amount of damage sustained." The Commission, in dismissing the complaint, said (p. 165):

"Certainly, the carrier's duty to furnish transportation does not arise until request is made therefor. Here no

request was made, therefore no liability for failure to furnish cars arose."

In *Winter's Metallic Paint Co. v. Chicago, M., St.P. & P. Ry. Co.* (1923), 87 I.C.C. 113, the complainant shipper alleged that during November 1922 the defendant rail carrier failed to furnish cars upon reasonable request, in violation of Section 1 of the Act, thereby subjecting him to injury, and sought the recovery of reparation. The complainant showed that during November 1922 its plant had 350 tons of paint pigments available for sale and shipment and that during that month only 170 tons were sold and shipped in four cars furnished by the defendant, and contended that the remainder might have been sold and shipped at a net profit of \$10 a ton if it had been furnished the necessary cars. The record made before the Commission showed that during November 1922 the complainant placed with the defendant carrier four specific car orders for the four cars which it actually received, but failed to place specific car orders for any additional cars. The complainant sought to excuse this failure by contending that "there was no use in ordering five or six cars, or three or four, when we couldn't get one." The Commission, in dismissing the complaint, held that the defendant rail carrier "could not be expected to furnish equipment which complainant had not ordered" and "The sole question presented for determination is whether the cars ordered were furnished within a reasonable time after defendant received the orders."

In *Sample v. Atchison, T. & S.F.Ry.Co.* (1928), 139 I.C.C. 324, in which it was also alleged that the defendant rail carriers failed to furnish sufficient cars, the Commission

referred to the fact that the duty of the carrier was "to provide and furnish transportation upon reasonable request therefor", and went on to say that "In order that the request may be reasonable it should be made far enough in advance of the time when cars are actually required for loading to enable the carriers when exercising due diligence to distribute the available cars equitably and fairly among shippers." (p. 330)

A converse situation was before the Commission in *Victor-American Fuel Co. v. Denver & S.L.R.Co.*, *supra* (115 I.C.C. 169), in which it was shown that a rail carrier was furnishing a shipper *more* cars than those for which it had placed specific car orders, the number furnished being the shipper's potential shipping capacity. The Commission applied the same general principle expressed in the previous cases to condemn this practice of the carriers as follows (pp. 173-174):

"Obviously the mine's order represents its maximum need on any day. To ignore the order when for less cars than the rating [based on capacity], and use the rating in lieu thereof, as the basis for car distribution, constitutes an unreasonable and wasteful practice. It here resulted in the furnishing to certain mines of more cars than they could use at times when other mines served by the railroad were being deprived of their ratable requirements for cars.

It is a well-recognized principle that a carrier's duty to furnish transportation does not arise until request is made therefor. Paragraph 4, of section 1 of the act, provides:

It shall be the duty of every common carrier subject to this Act engaged in the transportation of pas-

sengers or property to provide and furnish such transportation upon reasonable request therefor.

The shipper's request for transportation, when properly made, is his need and is the measure of the carrier's responsibility to him." (Emphasis supplied.)

Such a long-continued and uniform action of the Commission in holding that a carrier is obligated to furnish cars only upon the placing of specific day-to-day car orders is persuasive determination that such is the proper construction of Section 1 of the Interstate Commerce Act. *United States v. Minnesota* (1936), 270 U.S. 181, 205; *New York Cent. Securities Corp. v. United States* (1932), 287 U.S. 12, 24.

Therefore, all available criteria make it abundantly clear that, to have been "reasonable", the requests of Martin Brothers for the furnishing of cars should have been sufficiently specific to indicate a definite number and type of cars desired on a particular day. The record shows without conflict that Martin Brothers actually did receive all the cars for which it placed such specific requests. Exhibit No. 8 before the Commission (R. 748-759), prepared and presented by Mr. W. F. Forrest, a witness for Martin Brothers, is a summary of all of the specific car orders placed by Martin Brothers during the nine-month complaint period. This exhibit, which has separate columns entitled "No. of Cars Ordered", "Date Ordered", "Date Wanted", "No. of Cars Received" and "Date Cars Received", shows that Southern Pacific supplied Martin Brothers with all of the cars for which it placed specific orders.

The other acts relied upon by Martin Brothers as constituting requests for cars in addition to those actually re-

ceived, did not constitute reasonable requests ; i.e., they were not specific day-to-day requests for a definite number and type of cars on a particular day. A review of those other acts follows.

Martin Brothers presented evidence that in February, 1946, prior to the purchase of the Oakland plant, the president of Martin Brothers, in a conversation respecting its prospective operation of the plant with a Southern Pacific representative, stated what he expected its car requirements would be, both for the present and after the completion of a projected expansion of the plant, and that he was assured by the Southern Pacific representative that cars "could" be furnished (R. 146-148). This conversation, which occurred at least ten months prior to the beginning of the complaint period, was certainly not a specific order for the furnishing of a definite number and type of cars on a particular day. Indeed, this was so conceded by Martin Brothers' counsel, Mr. George L. Quinn, Jr., on oral argument before the Commission in the following colloquy between Commissioner Hugh W. Cross and Mr. Quinn (R. 681-682) :

"Commr. Cross : * * * You do not think verbal representations at that time were binding in any way, do you?

Mr. Quinn : No, sir. * * *

Commr. Cross : This is a representation made before the plant was put into operation. I am simply asking the question whether there is anything binding in the conversations that may have taken place?

Mr. Quinn : I think legally not ; no, sir."

Nor can this conversation be construed as having given rise to any contract obligating Southern Pacific to furnish cars. A rail carrier lacks the power to bind itself by contract

to furnish an absolute car supply to any particular shipper, because it would impose an obligation greater than its common-carrier obligation and result in undue discrimination. *Davis v. Cornwell* (1924), 264 U.S. 560, 561.

Martin Brothers presented in evidence letters dated July 30, 1946, and August 6, 1946, addressed to one of Southern Pacific's District Freight Agents at Los Angeles and Southern Pacific's Perishable Freight Traffic Manager at San Francisco, complaining of the insufficiency of the car supply Martin Brothers was then receiving and stating that its maximum car needs were 36 cars a week or 150 cars a month and that "Over the long pull for the next several years" it would require about 250 cars per month. These letters, written some five months prior to the beginning of the complaint period, cannot be construed as specific requests for the furnishing of a particular number of cars on a particular day, and their relevancy, if any, is confined to putting Southern Pacific on general notice that in the future cars would be ordered by Martin Brothers and of the capacity of the mill at Oakland. Moreover, neither Southern Pacific's Perishable Freight Traffic Manager at San Francisco nor one of its District Freight Agents at Los Angeles had any authority or duty with respect to the furnishing of cars.

Martin Brothers also presented evidence of various general complaints as to the adequacy of the car supply it was receiving as made on its behalf on undisclosed dates. None of these complaints constituted specific orders for the placing of a definite number of cars on a particular date. They rather constituted the same general type of complaint which Southern Pacific was receiving from other Oregon lumber shippers during the same period. Witness F. C. Nelson testified (R. 616):

“Q. [By Mr. Wedekind] Had you received complaints from any other lumber shippers about the car supply during the period from January 1 to September 30 inclusive, 1947?

A. Yes we did. There was some complaints registered in the early part of the year when we had a car shortage, but it was not as severe as it was later on in the year from July to September and October. During the period from July, 1947 to October, September, and the rest of the year, why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth, and otherwise.

Q. What was the general nature of those complaints?

A. They were complaining over the fact we were not supplying them with all the cars they wanted. The complaints were spread all over the State of Oregon, even originated in numerous and various parts of the United States. Of course, I only have knowledge of the particular complaints that we received through my office, most of which reached me, if not personally, by word of mouth from those under my jurisdiction and as well I knew a few people at points such as Salem, Eugene, Medford, were also receiving complaints in countless numbers.”

The aforesaid conduct of Martin Brothers, as relied upon as constituting reasonable requests for cars, bears a definite similarity to the condemned conduct of the shipper in *Koepp v. New Orleans G.N.R.Co.*, *supra* (110 So. 729, 730), described by the court as follows:

“Plaintiff kept no record of the special orders for cars that it claims to have given the defendant. Its witnesses testify, merely in a general way, that such orders were given to the agent at Ramsey, the railroad

station nearest plaintiff's mill, to conductors and brakemen on freight trains, by school children, and by telephone messages to and occasional interviews with certain employees and officials of the company."

That the various acts of Martin Brothers to which we have referred can not be rationally considered a substitute for specific day-to-day car orders is substantiated by their vague and inconsistent character, which is well illustrated in the following table summarizing the various conflicting estimates as to car "requirements" made by Martin Brothers between January 1 and August 6, 1946, and placed in the record by witnesses for Martin Brothers.

No. of Cars	Time When "Needed"	Record Reference
5 to 6 per day.....	"Until we get our wire-bound box production started"	R. 148
8 to 10 per day ¹⁰	"With one shift after we get our wirebound box production started"	R. 148-149
11 to 13 per day ¹¹	"With two shifts after we get our wirebound box production started"	R. 148-149
6 to 11 per day.....	"With two shifts"	R. 223
13 per day.....	"With three shifts"	R. 223
36 per week.....	"Our immediate need"	R. 777
"Considerably more".....	"Later on"	R. 777
150 per month.....	"For the time being"	R. 780
250 per month.....	"Over the long pull"	R. 780

Not only are these estimates indefinite and conflicting, but some necessarily depended for application on determinations peculiarly respecting Martin Brothers' business, i.e., whether Martin Brothers had commenced its wirebound box

10. The 5 to 6 cars shown in line 1 of the table, plus 3 to 4 cars for one additional shift.

11. The 5 to 6 cars shown in line 1 of the table, plus 3 to 4 cars for each of two additional shifts.

production and whether Martin Brothers was carrying on a one-, two- or three-shift operation. These are clearly not matters which Southern Pacific was under any duty to investigate.

Furthermore, the estimates in the above table are indefinite as to the calendar dates for which they were to apply. Certainly, these estimates, made from January to August 1946, could not rationally be construed as constituting any specific order for a definite number of cars on January 2, 1947, the first day of the complaint period, or on any other day of that nine-month period. Indeed, the various estimates of Martin Brothers set forth in the above table afford persuasive confirmation for the testimony of Southern Pacific's witness F. C. Nelson that "the Martin Box Company or representatives of the Martin Box Company gave me a lot of information as to how many cars they wanted at Oakland, but rarely ever did I get two alike" (R. 609) and "There seems to be some confusion in the Martin Brothers organization as to how many cars they wanted" (R. 610).

Although Martin Brothers seeks to recover damages for an alleged failure to furnish it cars which it claims should have been supplied to it in a time of car shortage, the conduct of Martin Brothers during that time was not of a kind to aid in mitigating the difficulties confronting a carrier and its shippers. Martin Brothers made general and conflicting statements as to its requirements; it almost inexplicably refrained from making specific requests for the additional cars now claimed to have been required through the use of car orders, although admonished to do so; and it cancelled specific car orders and failed to use promptly the cars which were supplied to it. All of these facts were shown in the record before the Commission and are developed in

this brief. It is in the face of these failures by it that Martin Brothers seeks to recover damages because of alleged violation of the Interstate Commerce Act.

Even the fundamental theory of the case presented by Martin Brothers sustains the propriety of the Commission's ultimate finding. That theory is that Martin Brothers made reasonable request for, and should have received, 8.4 (8-4/10) cars on each working day of the complaint period (R. 775). Its very ambiguity makes such a request unreasonable. If such a request legally bound Southern Pacific to furnish 8.4 cars on each day of the complaint period, was Southern Pacific bound to furnish 9 cars per day, or 8 cars per day, or was it bound arbitrarily to select six days out of each ten-day period on which to furnish 8 cars and four days on which it would furnish 9 cars? The patent ambiguity of a request for "8.4" cars prevents it from being a reasonable request.

Thus, it is clear that the record indeed contains substantial evidence to support the Commission's ultimate finding that Southern Pacific did not engage in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act.

We shall now take up specifically the reasons advanced in the District Court's opinion in support of its judgment setting aside the Commission's decision, so far as they pertain to this finding by the Commission. Those reasons consist of comments and criticisms by the Court upon what it refers to as the "conclusions" of the Commission, which are quoted by the Court as numbered subheadings in its opinion (R. 57 *et seq.*) These actually are merely statements of evidentiary fact which led to the Commission's ultimate finding

that Martin Brothers had failed to establish any unreasonable or unlawful practice by Southern Pacific in violation of Section 1.¹² In fact, these statements by the Commission fully support its ultimate finding; and not only does the District Court's opinion fail to show otherwise, but it also gives the clue to the Court's fundamental misapprehension which prompted it to set aside the Commission's decision upon an issue of fact concerning transportation practice. For convenience, we shall discuss the comments and criticisms of the Court under the numbered subheadings used.¹³

Subheading I is a quotation of the Commission's statement:

"The evidence establishes that, from January 1 to June 30, 1947, complainant received practically all of the cars for which specific written car orders were placed; that thereafter in the complaint period more cars were furnished than were requested by written orders, though some delays were experienced;" (R. 57.)

After discussing this statement the court concludes (R. 61):

"None of the cases upon which defendant relies support its contention that plaintiff's requests for cars were insufficient because of lack of specificity or that such requests were not reasonable requests within the meaning of the Act.

12. The distinction between findings of ultimate fact and statements of evidentiary or primary facts is referred to *supra*, p. 14.

13. We here discuss the Court's comments and criticisms under subheadings I to V and VII, which pertain to the Commission's ultimate finding that Southern Pacific did not engage in any unreasonable practice in violation of Section 1 of the Interstate Commerce Act. Those under subheadings VI and VIII pertain to other ultimate findings and are discussed *infra* in section C (p. 46) and section D (p. 51), respectively, of this argument.

In my opinion, the portion of the Commission's conclusions relative to written car orders has no bearing on any issue of this case and, if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law."

As we have shown *supra*, the courts have definitely and almost universally recognized that a carrier's duty to furnish cars is conditioned upon receiving reasonably specific requests therefor so that it may know the exact number and kind of cars to supply, and when. We have also developed the practical factors of empty-car distribution, which indicate that the rule of law as so recognized by the courts is but good common sense. Applying this rule of law or common sense to the case before us, it is the uncontroverted fact that Martin Brothers' day-to-day requests for cars of specified types at specified times were fulfilled by Southern Pacific, whether the specific orders were placed in writing by Martin Brothers or telephoned to and reduced to writing by Southern Pacific's agent (R. 748-759). Martin Brothers has not been able to point to any such orders which were not filled, but it did and could only point to the above-mentioned general representations made by it as to its car needs which were not filled by Southern Pacific. The Commission's ultimate finding rests upon the fact that these general representations were not reasonable requests for cars upon which the rail carriers' responsibility for furnishing cars is predicated. The Court in its opinion does nothing to refute this fact except to observe (R. 59) that "In the case at bar, the Southern Pacific knew that plaintiff wanted box cars." But so did all other shippers during this general car-

shortage period; and we have shown *supra*, page 22, that the record demonstrates that Martin Brothers could and did use other types of cars.

The District Court, in the paragraph last quoted from its opinion, finds fault with the Commission's reference in regard to "specific written car orders" and concludes that, insofar as the Commission may have required car orders to be written, its decision is contrary to law. If this sentence in the Commission's decision is regarded as being too restricted in requiring car orders to be written as well as specific, Martin Brothers was not harmed, because the record shows (see discussion *supra*, page 33) that Martin Brothers was furnished with all the cars for which it placed specific car orders, whether written by it or reduced to writing by the rail carrier's agent. The Court appears to lose sight of the fact that the burden was upon Martin Brothers, the complainant, to establish the case against Southern Pacific, the defendant, before the Commission. At the threshold of the case Martin Brothers had to show reasonable request upon Southern Pacific to furnish cars which were not furnished, and this it failed to do. For Martin Brothers to be entitled to have the Commission's decision on this ground set aside, it should show the Court that the evidence compelled the conclusion that there was reasonable request for freight cars other than the recorded car orders which Southern Pacific filled and that it did not receive all the available cars which it should have received. No such showing was made by Martin Brothers.

Subheading II is a quotation of the Commission's statement that "complainant desired, required, and attempted to secure additional cars from the defendant" (R. 61). This

was not a finding, or even a statement, by the Commission that Martin Brothers made reasonable requests for cars by placing specific car orders. Therefore, the Court was in error if it thought that this determination by the Commission was sufficient to dictate or support a recovery by Martin Brothers.

Subheading III is a quotation of the Commission's statement that "defendant and its employees made reasonable, and sometimes successful, efforts to furnish additional cars to complainant" (R. 61-62). The Court then finds that there was "no substantial evidence" to support the Commission's determination (R. 63). In addition to other substantiating evidence of record, the Commission's determination is adequately and fully supported by the fact that Martin Brothers was furnished all of the cars for which it placed specific oral or written orders. In supplying Martin Brothers with all of the cars ordered, Southern Pacific supplied Martin Brothers with actually a greater percentage of its car orders than it supplied other shipping members of the lumber industry generally on the Portland Division during the same period. That is to say, Southern Pacific supplied Martin Brothers with 100 percent of the cars for which it placed car orders and yet supplied the other lumber shippers on the Portland Division with an average of only 80 percent of the cars for which they placed car orders (R. 797).

Subheading IV is a quotation of the Commission's statement that "by reason of its inability to secure cars at all times when needed complainant was unable to fill some orders placed with it" (R. 63). This may be accepted as true; but it does not bear upon Martin Brothers' case against

Southern Pacific, and it was equally true as to all other lumber shippers on the Portland Division, who were supplied with an average of only 80 percent of the cars for which they placed car orders.

Subheading V is a quotation of the Commission's statement that "during 1947 the defendant suffered a daily shortage of 583 freight cars; that such shortage was a general one for which no direct responsibility can be placed upon the defendant" (R. 63-64). This determination by the Commission is found by the Court to be "amply" supported, and it removes from the case any claim of responsibility by Southern Pacific for the existence of a car shortage during the period in question, which was nation-wide in extent.

Subheading VII is a quotation of the Commission's ultimate findings that Martin Brothers had not established any violation of Sections 1 and 3 of the Interstate Commerce Act, as alleged (R. 69). As the Court has to its satisfaction disposed of the statements of the Commission adverse to Martin Brothers immediately preceding these findings of ultimate fact, it turns to consideration of "other evidence" of record.¹⁴ It there undertakes to reject as without significance the evidence reviewed by the Commission as to the failure of Martin Brothers to use promptly all of the cars which were furnished to it. We reveal this evidence *infra*, page 48, as pertinent to the Commission's subordinate finding that "the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation." Obviously, it is pertinent to Martin Brothers' claim for damages on account of the alleged

14. That other evidence pertains only to the alleged violation of Section 1 of the Act.

failure of Southern Pacific to furnish cars, to show that Martin Brothers did not make use of all of the cars which were furnished with reasonable promptness. This evidence is also pertinent in regard to Martin Brothers' general estimates as to the number of cars needed. If Southern Pacific should be called upon (which we do not think was the case) to furnish cars to Martin Brothers in line with the latter's assumed requirements, as gleaned from its estimates and other evidence, it was appropriate to show the doubt that the undue retention of empty cars by Martin Brothers cast upon the extent of those asserted "requirements".

C. The Record Contains Substantial Evidence to Support the Commission's Ultimate Finding That Southern Pacific Did Not Subject Martin Brothers to Any Undue Prejudice.

The Commission in its report found "that it is not shown that defendant unduly favored shippers other than complainant" (R. 125) and that "complainant has failed to establish that defendant during the complaint period * * * subjected complainant to any undue prejudice in violation of section 3" (R. 126). These findings are supported by substantial evidence.

The record contains substantial evidence that Martin Brothers received, during the complaint period, treatment in car service at least equal to that accorded other lumber shippers in Oregon. As shown *supra*, page 18, Southern Pacific furnished no other shippers with more cars than those for which they placed specific oral or written daily orders. And, as shown in Martin Brothers' own Exhibit No. 8, Southern Pacific actually did furnish Martin Brothers with all the cars for which it placed such oral or written orders. This showing that Martin Brothers received equal

treatment with other Oregon lumber shippers constitutes substantial evidence to support the Commission's finding that Martin Brothers failed to establish that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3.

Under *subheading VI* of its comments and criticisms respecting the Commission's decision, the court states in its opinion: "I am of the opinion that there is no substantial evidence upon which the Commission could have concluded that the 'defendant did not unduly favor shippers other than the complainant' " (R. 64-69). In an attempt to support this conclusion the Court states that the record shows that, on the one hand, during the complaint period, all shippers on the Portland Division were furnished an average of 80 percent of the cars ordered by them and that, on the other hand, Martin Brothers received a much smaller proportion of its alleged requirements, as indicated in the various general letters and oral communications to which we have referred. Passing for the moment the Commission's and our view that such general expressions of asserted requirements did not constitute car orders as would be required to put Southern Pacific in default in not furnishing cars, it is apparent that the Court has not compared like things. The only record made of cars ordered by other shippers consisted of specific orders which had been placed for particular cars at particular times on the Portland Division. If that is compared with the specific orders of such cars placed by Martin Brothers, it appears that it received more cars than were generally received by other shippers on the Portland Division. If it is sought to compare the number of cars furnished in respect of general representations as to requirements, it would be necessary, on the one hand, to ascertain what the

requirements amounted to on the Portland Division, as indicated by general representations as to capacities and requirements, and what percentage thereof were filled, and, on the other hand, what the general expressions as to requirements by Martin Brothers were and the portion thereof filled. The record shows that there were continual demands for more cars during the period of car shortage throughout the Portland Division, but there is nothing in the record to show the relationship of cars supplied on the Division to the total requirements or shipping capacities of all shippers.

D. The Record Contains Substantial Evidence that Martin Brothers Did Not Suffer Damages as Alleged.

The Commission's ultimate findings that Martin Brothers failed to establish that Southern Pacific, during the complaint period, engaged in any unreasonable or otherwise unlawful practice in violation of Section 1 of the Interstate Commerce Act, in furnishing or not furnishing cars to Martin Brothers, or that Southern Pacific subjected Martin Brothers to any undue prejudice in violation of Section 3, are also sustained by and consistent with the Commission's finding that "the evidence presented falls far short of the requirements in a proceeding of this character to support an award of reparation", which is in turn supported by substantial evidence. That substantial evidence consists of uncontradicted showings of record that during the complaint period Martin Brothers held many cars of all types for three or more days (excluding Sundays and holidays) after they had been placed on its spur track at Oakland. The extent to which Martin Brothers engaged in this practice is shown in the following table, which summarizes cars so held for

loading by Martin Brothers during the 228-day complaint period:¹⁵

Class of Car	Held 3 Days	Held 4 Days	Held 5 Days	Held 6 Days	Held 7 Days	Held 8 Days	Total
Box	55	25	9	4	2	1	96
Auto	31	27	6	3	—	—	67
Refrigerator	11	4	4	3	—	—	22
Stock	1	2	1	1	—	—	5
Gondola	2	—	1	—	—	—	3
Flat	4	2	1	—	—	—	7
All classes	104	60	22	11	2	1	200

(R. 818-843)

This holding of 200 cars, as shown by this table, for periods ranging from three to eight days during the 228-day complaint period constitutes substantial evidence rebutting the contention of Martin Brothers that it was *in fact* damaged as a result of not receiving 8.4 cars on each of its working days during the nine-month complaint period.

The Commission in its report described this showing as set forth in the above table and recognized it as “relevant in a consideration of the complainant’s ability to load cars in addition to those which were furnished” (R. 121). Yet the District Court in its opinion categorically rejects this substantial evidence so considered by the Commission, as follows:

“In my opinion the Commission did not intend to support its conclusions by the statements or findings hereinbefore set forth.” (R. 71)

After expressing such a gratuitous conclusion the court refers to certain factors as indicating the “lack of any probative value” of this evidence. Not only does this constitute a definite “weighing” of the evidence by the District Court,

15. The days shown include the last day but not the time the car was on hand prior to the first 7:00 a.m., and exclude Sundays and holidays.

but certain of the factors so referred to by the court contain statements contrary to and unsupported by the evidence of record. The Court states:

“Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff’s siding for more than three days, when the daily 7 a.m. track check was made.” (R. 72)

But an analysis of the exhibit presenting this showing (R. 818-843) definitely discloses that 104 cars were held by Martin Brothers for three days, excepting Sundays and holidays, following the first 7:00 a.m. after placing, 60 cars were held for four days, 22 cars were held for five days, 11 cars were held for six days, 2 cars were held for seven days, and 1 car was held for eight days. For example, car GN-25173, shown at page 1 of the exhibit under January 8, 1947, was placed some time before 7:00 a.m. of that date but the car was not released by Martin Brothers and did not move out until 7:00 a.m. on January 13, 1947 (R. 818). Thus, the car was actually held six calendar days, but is shown in the table as being held only four days, because the first day is excluded from the figure and one of the intervening days was a Sunday—Sundays and holidays being withheld from all computations of the days cars were held.

The District Court also states that a number of the cars set forth in the above table “were of limited value” to Martin Brothers because of destination restrictions (R. 72). Yet Martin Brothers’ president, Mr. F. G. Martin, conceded that no cars loaded by Martin Brothers were ever restricted to any particular destinations. Mr. Martin testified:

“Examiner Hanson: Did the railroad ever refuse to accept a car that you had billed to a foreign destination?”

The Witness: After it was loaded?

Examiner Hanson: When you presented the car and gave them the shipping papers.

The Witness: Not that I know of, not that I can remember." (R. 228)

"Examiner Hanson: They [Southern Pacific] never required you to ship anywhere?

The Witness: No." (R. 226)

Moreover, although the Court refers to certain destination limitations as applying to automobile and refrigerator cars, it is apparent from the showing summarized in the above table (page 48) that less than half of the cars thus held by Martin Brothers for excessive periods were of those two types.

The District Court also states that "Some of the entries in exhibit 42 [R. 818-843] are inconsistent with the defendant's exhibit 40 [R. 804-816]." This is an attempt by the Court to compare unlike situations, because these two exhibits do not purport to constitute the same type of showings: the car statistics of Exhibit No. 42 have their origins in a daily 7:00 a.m. yard check, while the statistics in Exhibit No. 40 were compiled from the original car orders placed with Southern Pacific by Martin Brothers and are not tied down to a 7:00 a.m. time.

The aforesaid statements by the District Court in criticism of Exhibit No. 42, in addition to being contrary to and unsupported by the evidence, reveal by their very content that the Court is attempting to weigh the evidence—a function which it is not the Court's to perform.

Other substantial evidence showing that Martin Brothers was not damaged as alleged is contained in *Martin Brothers' own Exhibit No. 8* before the Commission (R. 748-759),

U.S. 184, 204, with respect to an action for damages under the Interstate Commerce Act:

“The statute gives a right of action for *damages* to the *injured* party, and by the use of these legal terms clearly indicated that the damages recoverable were those known to the law and intended as compensation for the injury sustained. It is elementary that in a suit at law both the fact and the amount of the damage must be proved.” (Emphasis by the Court.)

Certainly, the failure of Martin Brothers to use some 200 cars for periods ranging from three to eight days during the 228-day complaint period, and the cancelling of orders for cars on many days of the complaint period, constitute substantial evidence that Martin Brothers was not *in fact* damaged as alleged.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded with instructions that the Court enter a judgment sustaining the validity of the report and order of the Interstate Commerce Commission and dismissing the action.

JAMES C. DEZENDORF,
 GEORGE B. CAMPBELL,
 JAMES E. LYONS,
 CHARLES W. BURKETT, JR.,
Attorneys for Appellant
Southern Pacific Company

San Francisco, California,
 April 9, 1954.

Certificate of Service

I hereby certify that I have this day served the foregoing document upon counsel for appellee by mailing, by first-class mail, three copies thereof addressed to Messrs. Irving Rand and Donald A. Schafer, Public Service Building, Portland 4, Oregon, and one copy thereof addressed to Mr. George L. Quinn, Bowen Building, Washington 5, D.C.

Dated at San Francisco, California, this 9th day of April, 1954.

CHARLES W. BURKETT, JR.

Of Counsel for Appellant

Southern Pacific Company



No. 14077

United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLEE,
THE MARTIN BROTHERS BOX COMPANY

*Appeal from the United States District Court for the
District of Oregon.*

FILED

GEORGE L. QUINN, Jr.,
815-15 Street, N. W.,
Washington 5, D. C.,

MAY 14 1954

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon,

Attorneys for Appellee.

PAUL P. O'BRIEN
CLERK



SUBJECT INDEX

	Page
Statement as to Jurisdiction	1
Appellee's Statement of the Case	3
Summary of Argument	7
Argument	7
Duty of Carriers	7
Judicial Review.....	10
Martin's Freight Car Requirements	12
Requests for Cars	16
Failure to Furnish Cars	22
Cars Furnished Other Shippers	25
Reparations	26
The Brief of Appellant, Interstate Commerce Com- mission	29
The Brief of Appellant, Southern Pacific Company ...	41
Conclusion	47

TABLE OF AUTHORITIES

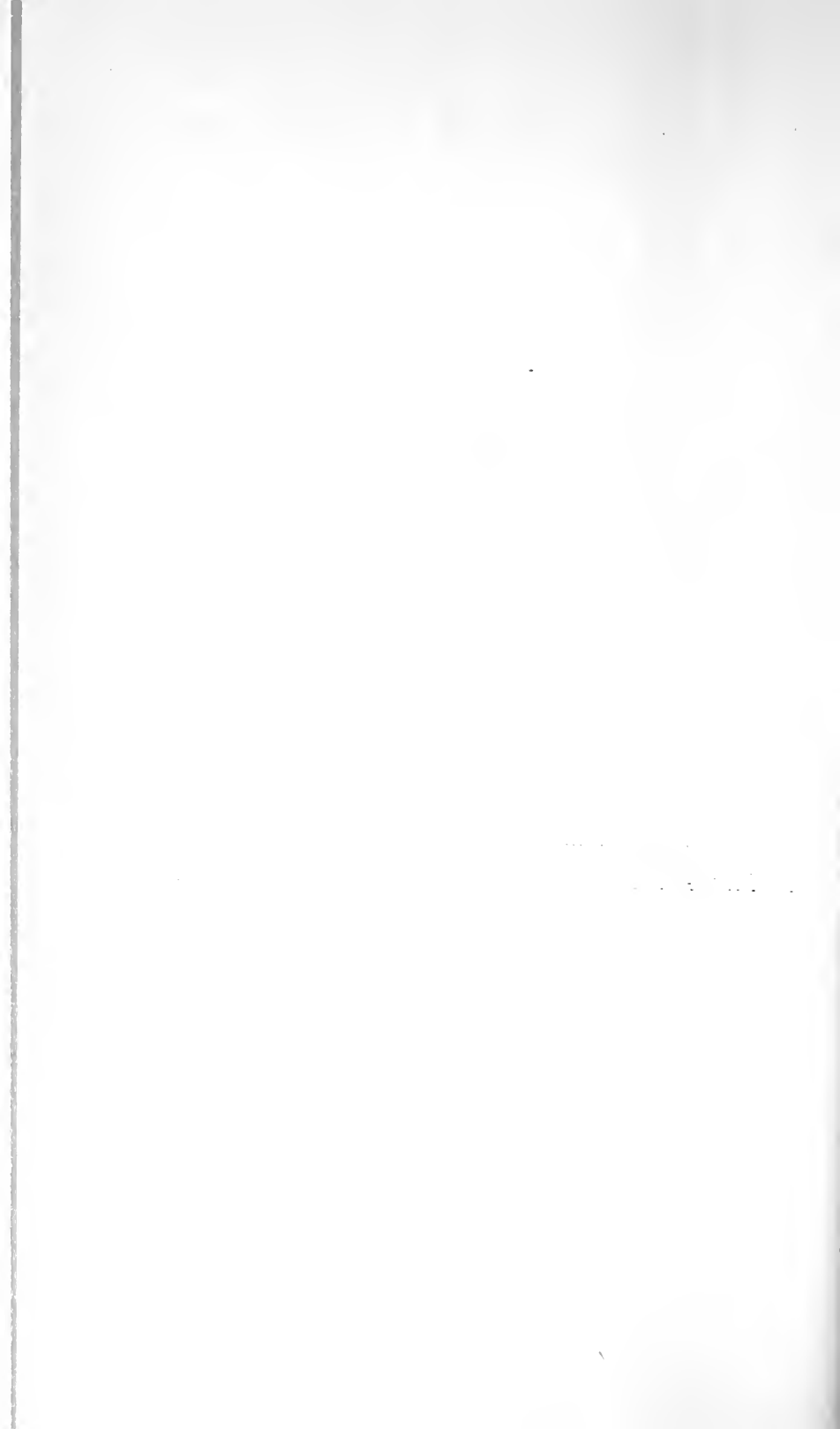
CASES

	Pages
Ayrshire Coal Co. v. Southern Ry. Co., 96 I.C.C. 161	9
Brownsville v. St. Louis Ry. Co., 91 F. (2d) 502	8
Chicago Junction Case, 264 U.S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667	10
Gray v. Powell, 314 U.S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301	10
Midland Valley R. Co. v. Barkley, 276 U.S. 482	9
New York Central Ry. Co. v. U. S., 99 F. Supp. 394 (342 U.S. 890, 72 S. Ct. 201)	11-31
Penn. Ry. Co. v. Puritan Coal Mining Co., 237 U.S. 121	9
Rochester Telephone Corp. v. U.S., 307 U.S. 125, 129, 59 S. Ct. 754, 83 L. Ed. 1147	10
State of New York v. U. S., 331 U.S. 284, 296, 67 S. Ct. 1207, 1213	40
Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed. 456	10
U. S. v. B. & O. R. Co., 333 U.S. 169, 68 S. Ct. 494	40-44
U. S. v. Carolina Freight Carriers Corp., 315 U.S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971	10
U. S. v. I. C. C., 337 U.S. 426, 69 S. Ct. 1410	2-31
U. S. v. I. C. C., 198 F. (2d) 958, 964 (D.C. Cir. 1951)	10
U. S. v. Penn R. Co., 323 U.S. 612, 616, 65 S. Ct. 471, 473, 89 L. Ed. 499	40
U S. v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 533, 66 S. Ct. 687, 90 L. Ed. 821	11

TABLE OF AUTHORITIES (Cont.)

STATUTES

United States Code:	Pages
Title 5, Sec. 1009-1011	2-10-31
Title 28, Sec. 41	2
Sec. 43	2
Sec. 48	2
Sec. 225	2
Sec. 1336	2
Sec. 1398	2
Sec. 2321	2
Sec. 2322	2-29
Sec. 2323	2
Sec. 2324	2
Sec. 2325	2
Title 49, Sec. 1 (4)	1-8-21
Sec. 1 (11)	8-21
Sec. 3 (1)	8-21
Sec. 17 (9)	2
38 Stat. 219	2
54 Stat. 916	2



United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLEE,
THE MARTIN BROTHERS BOX COMPANY

*Appeal from the United States District Court for the
District of Oregon.*

STATEMENT AS TO JURISDICTION

The appellee, The Martin Brothers Box Company, filed with the Interstate Commerce Commission a complaint against the appellant, Southern Pacific Company, under the provisions of the Interstate Commerce Act, as amended, 49 U.S.C.A., sections 1 et seq. The Commission by order dismissed the complaint. The Commission denied a petition for reconsideration. Appellee

under the provisions of the Urgent Deficiencies Act of 1913, 38 Stat. 219, 28 U.S.C. § 41-43-48, 28 U.S.C.A. § 1336, 1398, 2321, 2322, 2323, 2324, 2325 and section 17 (9) of the Interstate Commerce Act, 54 Stat. 916, 49 U.S.C. 17, petitioned the District Court of the United States for the District of Oregon to set aside and annul this order and to remand the matter to the Commission. The scope of the review of the matter by said District Court is set forth in the Administrative Procedure Act, Title 5, U.S. C.A., section 1009.

The complaint before the I.C.C. is set forth in the printed Transcript of Record (hereinafter designated R.) at pages 77-81; the order of the Commission dismissing the complaint at page 127; the order denying reconsideration at page 128; the amended petition filed with the District Court at pages 3-28.

The authority of a single judge in a case of this character is confirmed in *U. S. v. I. C. C.*, 337 U.S. 426, 69 S. Ct. 1410.

The jurisdiction of the Court of Appeals for the Ninth Circuit is said by the appellants to be based upon section 225, Title 28, U.S. Code.

APPELLEE'S STATEMENT OF THE CASE

The appellee, The Martin Brothers Box Company, deeming the statement in the brief of appellant, Southern Pacific Company, and the statement in the brief of appellant, Interstate Commerce Commission, inadequate and in some respects inaccurate, presents to this Court the following:

Martin, manufacturer since 1909 of boxes and other containers in Toledo, Ohio, desiring an assured supply of lumber for the Toledo plant, purchased a sawmill on the lines of Southern Pacific at Oakland, Oregon, and rights to large quantities of standing timber, in March of 1946. Martin made the decision to acquire the Oakland plant for the reason also that there was a large and profitable market to be had in the west for wire-bound boxes for vegetables, fruits and meat products. The Oakland plant is located on the Siskiyou line of Southern Pacific Company, and there is no means of transportation by rail to or from Oakland other than that furnished by Southern Pacific. Prior to the purchase by Martin of its Oakland plant the question of adequate rail transportation was discussed with officers of Southern Pacific, and Southern Pacific was told that Martin was going to start the manufacture of wire-bound boxes at its plant at Oakland, and ship lumber for the manufacture of wirebound boxes to its plant at Toledo, Ohio, in addition to the products which were produced by the former owner of the sawmill, and what Martin's freight car requirements would be, and Martin was given assurances that cars could be obtained.

Upon purchasing the mill, Martin enlarged the plant, increasing the car loading capacity from 6 cars to 25 cars, and installing wirebound box making machinery and other equipment.

Before the end of 1946, difficulty in obtaining cars for transporting the products of the Oakland plant was encountered, and the salesmen of Martin were instructed to relax their sales efforts. During 1947, the difficulties in obtaining cars became so aggravated that on October 14, 1947, Martin filed with the Interstate Commerce Commission a complaint demanding, among other things, that Southern Pacific Company be required by order of the Commission to furnish to Martin adequate transportation. By the time the matter came on to be heard before an Examiner Martin's Oakland plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation. During this complaint period Martin had business sufficient for the use of and could have used 13 cars per day, and required an absolute minimum average of 8.4 box cars for each working day to transport the products of the Oakland plant in interstate commerce. During this period Southern Pacific Company furnished a total of 593 cars (an adjusted figure, using 2 or 3 refrigerator cars as equivalent to 1 box car), including stock cars, restricted destination cars, refrigerator cars and other inferior cars, or an average of about 3 cars per working day. At the hearing Southern Pacific

Company showed that it had been supplying shippers along its lines, other than Martin, with an average of 80 per cent or better of their transportation requirements.

On the basis of this showing, the Examiner found that Martin, as compared to other shippers on the lines of Southern Pacific Company, had been discriminated against and that this discrimination was in violation of the Interstate Commerce Act, and that Martin was entitled to reparations in the sum of \$135,220.56 (R. 106).

To this report of the Examiner Martin filed with the Commission exceptions contending that the amount of reparations should be a larger amount, and otherwise accepting the said report proposed by the Examiner in full (R. 10).

Southern Pacific filed exceptions to the report of the Examiner which are generally referred to in the petition of Martin in the District Court (R. 10 to 18). Thereafter, at the request of Southern Pacific, oral argument of the matter was held before Division 3 of the Commission, consisting of three commissioners. On the 12th day of March, 1951, a report was issued by the Commission by Division 3, containing findings and conclusions, and an order was issued dismissing Martin's complaint (R. 108-127). On May 18, 1951, Martin filed with the Commission a petition for reconsideration and requested oral argument before the entire Commission, and on July 14, 1951, Southern Pacific filed its reply to said petition. Thereafter, on July 30, 1951, at a general session of the Commission, it was ordered that the petition for reconsideration be denied (R. 128).

Thereupon, Martin petitioned the District Court of the United States for the District of Oregon for a review and reversal of the conclusion and determination of the Commission that Martin was not entitled to reparations (R. 3 to 28).

The District Court thoroughly reviewed the entire record, for the purpose, as stated in his opinion, of "determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed" (R. 44). Upon a review of the record and on the basis of the essential facts as found and determined by the Commission, supported by substantial evidence in the record, the Court determined that the conclusion of the Commission was erroneous as a matter of law. Accordingly, the District Court set aside the order of the Commission denying reparations and remanded the cause to the Commission for further proceedings not inconsistent with the Court's opinion, findings and conclusions. (R. 74-75).

This leaves the matter before this Court on this appeal for a determination of whether the conclusions of the Examiner and of the District Court were correct upon the basis of essential facts, or whether the conclusions of the Commission were correct. This issue, which is one of law, will be more fully developed in our argument.

SUMMARY OF ARGUMENT

The Examiner, having found upon substantial evidence, and the Commission, having found upon the same substantial evidence, and the Court, having found upon the same substantial evidence: (a) that during the period in controversy the common carrier in interstate commerce, Southern Pacific Company, furnished and supplied all shippers using its transportation facilities, other than the complainant, The Martin Brothers Box Company, with from 80 per cent to 100 per cent of the transportation requirements of such shippers; and (b) that during this period the complainant shipper in interstate commerce, The Martin Brothers Box Company, was furnished and supplied by this carrier substantially less than 50 per cent of the transportation desired and requested; and (c) that damage in substantial amounts was sustained by the shipper, The Martin Brothers Box Company, by this failure of the carrier to furnish the required and requested transportation, is the conclusion of the Commission, that the complaint of the shipper demanding adequate transportation and reparations for past failure to furnish adequate transportation should be dismissed, a proper legal conclusion in view of the provisions of the Interstate Commerce Act.

ARGUMENT

Duty of Carriers

Respecting the law as defining the duties of Southern Pacific, which is admitted to be a common carrier engaged in transporting property in interstate commerce

and subject to the Interstate Commerce Act, we summarize the applicable statutes as follows:

Section 1 (4) of the Interstate Commerce Act (49 U.S.C.A. § 1) makes it the duty of every common carrier subject to the act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor.

Section 1 (11) requires that every such common carrier furnish adequate car service, and establish, observe and enforce reasonable rules and practices with respect to car service; and every unjust practice with respect to car service is prohibited and declared to be unlawful.

Section 3 (1) makes it unlawful for any common carrier subject to the act to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, corporation or locality, or to any particular description of traffic, or to subject any particular person, company, corporation or locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Common carriers are obliged to distribute the cars they have available on a reasonable basis. According to *Brownsville etc. v. St. Louis etc., Ry. Co.*, 91 F. (2d) 502, the Transportation Act of 1920 (§ 1 (11) supra) makes it the duty of a common carrier by railroad to furnish the shipper, upon reasonable request, with necessary cars for the movement of property to be shipped, and exacts what is reasonable from carriers who transport freight in railroad cars.

Penn. Ry. Co. v. Puritan Coal Mining Co., 237 U.S. 121, holds that the law exacts what is reasonable from carriers, and "at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically."

Midland Valley R. Co. v. Barkley, 276 U.S. 482, holds that the law exacts what is reasonable from such carriers.

A Commission decision, Ayrshire Coal Co. v. Southern Ry. Co., 96 I.C.C. 161, states as follows:

"It is the duty of a carrier to furnish reasonable car supply and make a reasonable and equitable distribution of such cars as it has available."

We think that under these statutory provisions, according to their plain language and as construed by the United States Supreme Court and by the Commission itself, there can be no question concerning the duty of Southern Pacific to have furnished and supplied railroad cars to Martin for transportation of Martin's products, in substantially the same proportion and ratio in times of car shortage as was furnished other shippers in the same or other territories along Southern Pacific's lines. It was, of course, the duty of Southern Pacific in ordinary times, and assuming no car shortage, to furnish Martin all the cars requested and required for transportation of Martin's products in interstate commerce. In time of shortage, it was the duty of Southern Pacific to make a reasonable and equitable distribution to Mar-

tin of its pro rata proportionate share of the available supply of cars.

Judicial Review

The trial judge, in his opinion (R. 44), outlined the duties of the court upon a review of the decision of the Interstate Commerce Commission, as follows:

“There is no substantial dispute between the parties as to the scope of review by this court of the Commission’s order. This court, according to *United States v. Interstate Commerce Commission*, (D.C. Cir. 1951), 198 F. 2d 958, 964, is

‘to apply the standards of judicial review which are generally applicable to administrative action—the standards reflected in the Administrative Procedure Act, § 1 et. seq. 5 U.S.C.A., § 1001 et. seq., and in such decisions as *Universal Camera Corp. v. N. L. R. B.*, 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed 456; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971; *Gray v. Powell*, 314 U.S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; *Rochester Telephone Corp. v. United States*, 307 U.S. 125, 129, 59 S. Ct. 754, 83 L. Ed. 1147; and *Chicago Junction Case*, 264 U.S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667.’

“In other words, this court is limited to determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed.”

Later in the opinion the trial court indicated (R. 56),

“I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission’s conclusions. Or, stated differently, whether the Commission’s conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law.”

In the case of *New York Central Ry. Co. v. U.S.*, 99 F. Supp. 394 (342 U.S. 890, 72 S.C. 201, Aff'd without opinion,) the Court reviewed an order of the Interstate Commerce Commission cancelling certain new rate schedules of certain railroads. The Commission's decision was attacked as being erroneous in law, unsupported by essential basic findings, and unsupported by substantial evidence on the record as a whole. The Court entered judgment setting aside the order of the Commission. The Court said (p. 401):

"The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree." And further: "As stated in *United States v. Pierce Auto Freight Lines, Inc.*, 1946, 327 U.S. 515, 533, 66 S. Ct. 687, 90 L. Ed. 821, an ultimate finding is not enough in the absence of a basic finding to support it. Where the ultimate finding, as here, is in the negative form, the report must contain sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds for refusing to find, as the case might be, that the proposed schedules are 'just and reasonable' . . . "

With these statements of the scope of judicial review in mind, let us now turn to the record to determine whether the trial judge misapplied any of these principles as contended by the appellant, Southern Pacific Company, and the appellant, Interstate Commerce Commission.

We have divided the factual situation into five sub-headings, which we will discuss in order.

Martin's Freight Car Requirements

The record shows without any dispute whatsoever that during the complaint period The Martin Brothers Box Company was manufacturing at the Oakland, Oregon, plant sawn lumber and rotary cut lumber, or veneer, and wirebound boxes made from lumber. Transportation of these products required only box cars. Martin had no use for stock cars or flat cars or gondola cars or refrigerator cars, except as a desperate substitute for lacking box cars.

Based upon competent and satisfactory evidence, the Examiner found, and the Commission found, and the trial court found the following to be established facts concerning the railroad car requirements of The Martin Brothers Box Company for transporting the products of the Oakland plant during the entire complaint period from January 1, 1947, to September 30, 1947, inclusive:

Martin intended to continue operation of the lumber mill bought in 1946 and estimated that about 5 or 6 cars would be needed each day for shipment of lumber. Martin intended to (and did) enlarge the plant, installing machinery and producing boxes, and estimated that from 3 to 4 cars would be needed each day for shipment of the boxes produced for each eight-hour shift. With two shifts operating, freight car requirements of the plant would be 13 cars per day.

District Court finding - R. 45-46

Commission finding - R. 110

Examiner's finding - R. 86

By letters dated July 30 and August 6, 1946, Martin informed Southern Pacific of an immediate minimum requirement of 36 cars per week or 150 cars per month, and that the needs of the Oakland plant would be increasing to about 250 cars a month.

District Court finding - R. 46

Commission finding - R. 110-111

Examiner's finding - R. 87

A representative of Martin, while endeavoring to secure more cars from Southern Pacific, in a discussion with a representative of Southern Pacific, was told that Martin's fixed quota was only 5 cars per day, and was later told that the quota would be doubled to 10 cars a day, although there was doubt because of the car shortage that Martin would be given more than 50 per cent of its quota.

District Court finding - R. 47

Commission finding - R. 112

Examiner's finding - R. 88-89

The Oakland agent of Southern Pacific knew that Martin required cars in addition to those being furnished by Southern Pacific, and attempted to obtain additional cars for Martin through various other officials of Southern Pacific.

District Court finding - R. 47

Commission finding - R. 113

Examiner's finding - R. 89

Martin had orders from customers sufficient for operation of the Oakland plant at capacity during the entire complaint period, but for lack of cars was only able to operate one shift and for periods of time was required to cease operations.

District Court finding - R. 47-48

Commission finding - R. 113

Examiner's finding - R. 89

Martin required about 65 carloads of lumber a month to keep each shift of the Toledo plant operating, but because of failure of Southern Pacific to furnish cars was able to ship to Toledo only 142 cars during the entire complaint period and the Toledo plant ceased two-shift operations March 18, 1947.

District Court finding - R. 48

Commission finding - R. 114

Examiner's finding - R. 90

The Oakland agent of Southern Pacific admitted that he knew Martin wanted and desperately needed more cars than Martin received, and this agent acknowledged that Martin demanded more cars than were furnished.

District Court finding - R. 47

Commission finding - R. 119

Examiner's finding - R. 95

The Examiner made a finding and determination that Southern Pacific, "knew or should have known that complainant's minimum car requirements were more than 150 cars a month and that defendant should have furnished to complainant about 80 per cent of its requirements, the percentage figure that it admits were furnished on the average to other shippers on its lines during this period" (R. 98), and on this basis the Examiner "concluded that complainant should have been furnished an average of 6 cars each working day" (R. 104).

The Commission, while not making specific findings as to the daily or monthly car requirements of Martin, did specifically find that Martin had orders from customers requiring operation of the Oakland plant at full capacity during the entire complaint period (R. 113) and also did specifically find that with two shifts operating the freight car requirements were 13 cars each day (R. 110). The Commission further specifically determined as one of its Conclusions "that complainant desired, required, and attempted to secure additional cars from defendant" (R. 125).

The District Court found "in view of the productive capacity of plaintiff's lumber and box manufacturing plants at Oakland and the information concerning such operations which were communicated to defendant and of which defendant had personal knowledge, plaintiff was entitled to a quota in excess of 5 cars a day. However, even on the basis of only 5 cars a day, the evidence showed that the plaintiff did not receive its proportionate share of the freight cars as compared to freight cars received by other shippers" (R. 65-66). Earlier in his opinion the District Court, referring to the conclusion of the Commission that "complainant desired, required, and attempted to secure additional cars from the defendant;" determined that the findings of the Commission relative to the attempts of Martin to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion (R. 61) of the Commission.

Requests For Cars

Having discussed the freight-car requirements of Martin, we now turn to the subject of the reasonable requests made by Martin for the supply of such cars required.

In the report of the Commission (as well as that of the Examiner) it is specifically found, based upon competent and satisfactory evidence in each instance, as far as concerns requests for transportation, as follows:

1. Before purchasing the Oakland plant in 1946, Martin's president discussed car requirements with officers of Southern Pacific and was given assurances that cars could be obtained.

District Court finding - 45
Commission finding - R. 110
Examiner's finding - R. 86

2. By letters in 1946, Martin informed Southern Pacific of its even then desperate need for cars and that the immediate minimum requirements were 36 cars per week or 150 cars per month and that the needs would be increasing to about 250 cars per month.

District Court finding - R. 46
Commission finding - R. 111
Examiner's finding - R. 87

3. At various times prior to and during the first nine months of 1947, Martin's officers and other personnel complained to Southern Pacific that adequate cars were not being received and that additional cars were urgently needed to fill orders of producers of perishable commod-

ities, which, in turn, urgently needed the containers for shipment of their produce, and for shipments of lumber to the Toledo plant.

District Court finding - R. 46

Commission finding - R. 111

Examiner's finding - R. 87

4. Martin's salesmen were notified to stop taking further orders and at different intervals were permitted to come to Oakland in an effort to aid in the attempt to obtain more cars from Southern Pacific.

District Court finding - R. 46

Commission finding - R. 111

Examiner's finding - R. 88

5. One of the salesmen testified at the hearing that he spent one and one-half months in Oakland during the fall of 1946, and three months during the spring of 1947, during which time he exerted all his efforts to obtaining more cars. He made daily telephone calls each morning before 7:45 A. M. to the office of Southern Pacific's local freight agent at Roseburg, Oregon, and went over the switch list with Southern Pacific's employees to ascertain how many cars, if any, were to be spotted at Martin's plant that day.

District Court finding - R. 46-47

Commission finding - R. 111-112

Examiner's finding - R. 88

6. On several occasions this employee induced Southern Pacific's employees to reconsider and assign a car for Martin's plant, and, "He made trips to Medford, Oreg., and called on the defendant's division freight and passenger agent who agreed to do all he could to afford relief."

District Court finding - R. 47
Commission finding - R. 112
Examiner's finding - R. 88

7. He also called on Southern Pacific's Freight Traffic Manager at Portland and pleaded for cars.

District Court finding - R. 47
Commission finding - R. 112
Examiner's finding - R. 88

8. Southern Pacific maintained an agent at Oakland, who was in daily contact with Martin's plant and sometimes went there two or three times a day. In addition, one of Martin's employees generally visited Southern Pacific's office at Oakland, both in the forenoon and afternoon of each day. While there he often called the Southern Pacific's office at Eugene with respect to the assignment of cars for Martin.

District Court finding - R. 47
Commission finding - R. 113
Examiner's finding - R. 95

9. In the period subsequent to June 30, 1947, the distribution of cars to shippers on the Portland Division, including Martin, was made on a percentage-of-quota basis.

District Court finding - R. 51
Commission finding - R. 118-119
Examiner's finding - R. 94-95

10. At this point we inject a quotation from the testimony of Mr. Bogan, the Oakland Agent of Southern Pacific:

"Q. You knew they wanted more than they were getting?

A. Yes, because they were loading trucks with boxes and hauling them out.

Q. Did that indicate to you they were pretty desperate for cars?

A. Sure.

Q. Didn't you have occasion to complain to Martin Box that Stapleton was using your telephone too much?

A. That was—he did use it, yes. He talked to the car man also.

Q. He talked to the man at Eugene?

A. Yes, and he told us he couldn't do it, it was against the rules or something like that.

Q. The Eugene man told you he was using Southern Pacific's phone more than Southern Pacific was, isn't that a fact?

A. That's right, that's about it all right. He wanted to find out what cars he was getting and so in order to spot the cars at, if he wanted them at the mill or the box plant or where he would want it" (R. 639).

11. Also Mr. Fred J. Martin, President of Martin, personally went to San Francisco to see officials of Southern Pacific in the endeavor of securing some relief from the car shortage, and was told to see Mr. Nelson, Southern Pacific Freight Traffic Manager, in Portland, and Mr. Martin did go to Portland and did see Mr. Nelson, being, according to Mr. Nelson, "very much upset about the fact that he couldn't get sufficient cars to satisfy him, that he was also particularly concerned about the fact, as he stated to me, that we would not permit Southern Pacific cars to go off-line, that is, to some connection of the Southern Pacific beyond the Southern Pacific" (R. 602-603).

12. Also D. J. Martin, Manager of the Toledo, Ohio, plant of Martin, on August 1, 1947, (Exhibit 12) sent the

following Western Union Telegram to the Freight Traffic Manager, Southern Pacific Railroad, Portland, Oregon, and on the same day sent an identical telegram to the Vice President of the Southern Pacific Railroad at San Francisco:

"Your failure to provide adequate empty cars for our Oakland Oregon plant means that substantial movement of material for our Toledo plant has been practically eliminated. It has become necessary for us to purchase southern hardwoods in lieu of fir produced at our Oakland plant. This means loss of movement to you entirely. Our trade prefers boxes produced from fir of our own manufacture. In six weeks only two cars have been loaded from Oakland whereas thirty cars of material were required and released. If situation continues movement will be killed completely by complete diversion to southern hardwoods.

"What immediate action can be expected. Wire or telephone us Toledo" (R. 784).

13. On September 25, 1947, The Martin Brothers Box Company sent a telegram to L. P. Hopkins, Southern Pacific Superintendent at Portland, from Oakland, reading (Exhibit 12-R. 787): "Cars promised us last two days not arriving. Situation desperate."

Not only was reasonable request for transportation made as the statute requires, but every possible effort was made by Martin to secure cars.

The trial judge thoroughly considered this phase of the case. His opinion in this regard first states (R. 56-57):

"I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions.

Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law.

"In my opinion, the statement set forth in the second paragraph of the conclusions correctly set forth the rules of law relative to the distribution of cars by a railroad. A railroad, under § 1 (4), § 1 (11) and § 3 (1) of the Act is required:

"1. To furnish transportation upon reasonable request.

"2. To establish and enforce reasonable rules with respect to car service.

"3. To refrain from causing any undue influence or unreasonable preference or advantage to any particular person, company, locality, or territory.

"4. To treat shippers fairly, if not identically, in case of a car shortage.

"There remains the question of whether the other conclusions are supported by substantial evidence and are not contrary to law."

The Judge then continues (R. 58):

"The findings of the Commission, heretofore summarized, and the evidence upon which such findings are based, show the continuous request of plaintiff to secure additional box cars to partially satisfy its urgent need for such cars.

"In spite of defendant's knowledge of the needs of plaintiff and its almost daily requests for such cars, defendant contends that such requests do not meet the requirements of specificity demanded by the Act."

And then after showing the non-applicability of the cases cited by Southern Pacific, the trial judge quoted

the conclusion of the Commission (R. 61) that "complainant desired, required, and attempted to secure additional cars from the defendant;" and determined that "The findings of the Commission heretofore summarized relative to the attempts of plaintiff to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion of the Commission."

Later in the opinion (R. 65) Judge Solomon stated:

"I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required."

It thus appears with no doubt whatever that the Commission and the trial judge also determined and concluded, upon the basis of substantial evidence, that Martin made reasonable requests for transportation in accord with the Interstate Commerce Act.

Failure To Furnish Cars

The next matter for consideration is whether during the complaint period Southern Pacific supplied to Martin an adequate supply of box cars for transportation of Martin's products in interstate commerce.

First in this connection an explanation of the term "reefers" is in order. Southern Pacific spotted on Martin's track 131 refrigerator cars, called for short reefers. These cars are highly undesirable and unsatisfactory.

Mr. Nelson, Freight Traffic Manager of Southern Pacific, explained (R. 631) that the doors are not wide enough to load lumber. Mr. Holland, a representative of Martin, testified (R. 286) that it is practically impossible to get a hoister or any mechanical conveyor into a reefer to unload the boxes, which means that they must be handled manually, and that with customers having small plants the spotting of several reefers instead of one car meant one or more days delay in loading or unloading due to switching difficulties.

The Commission found that Martin was furnished 593 cars during the period from January 1 to September 30, 1947, inclusive, or an average of about 3 cars per day. (R. 113). The Commission adjusted the number of cars furnished to reflect the regulations of a Service Order of the Commission permitting the use of two or three refrigerator cars in place of one box car.

Southern Pacific put in evidence Exhibit No. 41 (R. 817) showing that Martin was supplied during the nine months complaint period with 499 box cars, 131 reefers, 9 stock cars (Martin was shipping no cattle), 16 flat cars and 9 gondolas (Martin was shipping no coal). This totals 664 cars. Southern Pacific also put in evidence Exhibit No. 42 (R. 818 to 843), designated a Statement Showing Daily Check of Freight Cars on Spur Track of The Martin Brothers Box Company at Oakland During the Period January-September, 1947, inclusive, and showing a total of 654 cars of all classes spotted from January 2 to September 30, 1947, inclusive. This exhibit shows that 11 cars were spotted under load, and 5 cars

were spotted but were to be cleaned by Southern Pacific before being loaded, and one car was shown to have been removed from the spur track to be cleaned (and was never returned), and 131 cars were reefers. Deducting the reefers and the cars spotted under load and the car removed for cleaning and not returned, there remains during the nine months period 511 cars supplied by Southern Pacific to Martin for transportation of Martin's products, of which 34 cars were stock cars, flats or gondolas.

The Commission, as above stated, found that during the complaint period Martin was furnished 593 cars or an average of about 3 cars per working day. This number is the adjusted number above referred to. A summary of the cars furnished as taken from Exhibits 41 and 42 put in evidence by Southern Pacific shows the furnishing of 477 satisfactory box cars, 34 stock cars, flats and gondolas, useable only in extreme emergency, and 131 reefers, which were unloadable for lumber, unacceptable for boxes and of restricted destination to California (R. 511, testimony of Mr. B. T. Ayers, Southern Pacific Company's Superintendent of Freight Car Service; and Southern Pacific's Exhibit No. 34—R. 798-802).

The number of cars required by The Martin Brothers Box Company during this complaint period and for which reasonable requests were made approximated 1,600, and the number furnished by Southern Pacific, with over-generous calculation in favor of Southern Pacific, was 593 cars, or considerably less than half of the number of cars requested and required.

Cars Furnished Other Shippers

With this in mind, let us turn now to the record as to the cars furnished to other shippers during the same period.

Southern Pacific Company put in evidence Exhibit No. 31 (R. 797), which had been prepared under the direction of Mr. Ayers, which showed cars ordered and furnished by Southern Pacific during the first nine months of the year 1947. This exhibit showed and this witness testified that between December 29, 1946, and October 4, 1947, an overall average of 80 per cent of the box, flat and gondola cars ordered were furnished shippers on all divisions of Southern Pacific Company, including the Portland Division (R. 507-508).

The Examiner found and the Commission found that during the period in question Southern Pacific furnished an overall average of 80 per cent of the car requirements of shippers upon its lines other than The Martin Brothers Box Company. The trial judge analyzed this situation by months during the complaint period (R. 64-68) and showed that during some months there was no general shortage of box cars, and that during the periods in which there was little or no shortage of box cars on the Portland Division, The Martin Brothers Box Company, nevertheless, received only a small portion of the cars which it required.

The Commission and the trial judge found as a fact that Mr. W. F. Forrest for The Martin Brothers Box Company traveled 7,752 miles in making a survey of

other shippers on the lines of Southern Pacific and found no shortage of cars with any shipper at competitive points. He also during the complaint period was Traffic Manager for Timber Structures, Inc. at Portland, Oregon, and requested many cars from Southern Pacific and experienced no difficulty in obtaining cars (R. 304-308). The trial judge remarked (R. 66), referring to the testimony of Mr. Forrest, "This testimony was uncontradicted and, in my opinion, is corroborated by the defendant's own evidence."

At the hearing Martin put in evidence Exhibit No. 47 (R. 791-794), which was an excerpt from a transcript taken before the Interstate Commerce Commission on April 30, 1947, at a hearing on an application of a water carrier for additional operating authority. The excerpt consisted of testimony by a representative of Southern Pacific Company, who claimed that it was at that time experiencing no shortage of cars available for shippers.

District Court finding - R. 50

Commission finding - R. 116

Examiner's finding - R. 92

Reparations

On the basis of the record so made, the trial court determined as a matter of law that the discrimination against The Martin Brothers Box Company so practiced by Southern Pacific Company was in violation of the Interstate Commerce Act, and The Martin Brothers Box Company was entitled to reparations for the damages

sustained. On the matter of reparations, Martin had prayed in the petition before the trial court that the matter be remanded to the Commission with specific directions to award Martin such damages as the Court should find Martin to be entitled to under the evidence, and for further action not inconsistent with the Court's judgment. The trial court determined (R. 73) that the record contains evidence of damage to support an award of reparations and that Martin was entitled to have the matter remanded to the Commission for further proceedings in conformity with the opinion.

The matter is before this Court now upon the sufficiency of the conclusions of the trial court and not upon the question of the amount of reparations.

The record in this proceeding before the Commission and before the District Court shows, and as to the facts the Examiner and the Commission and the District Court found as facts of the matter, upon clear and satisfactory evidence, that during a period of car shortage generally:

(1) The Martin Brothers Box Company desired and required for transportation of its products in interstate commerce and attempted to secure from the common carrier, Southern Pacific Company, the only source of railroad interstate transportation from Oakland, Oregon, approximately 1,600 freight cars during the complaint period;

(2) Martin made requests, demands and prayerful importunities for car service, to every official of South-

ern Pacific Company, from the lowly station agent at Oakland to the vice president in San Francisco;

(3) Martin was given a supply of cars amounting to about one-third of Martin's requirements during the complaint period;

(4) Other shippers along the lines of Southern Pacific with heavy pay-bottom loads and situate where Southern Pacific had competition with other rail carriers secured during this period from Southern Pacific from 80 per cent to a full 100 per cent of their car service requirements;

(5) The damage to Martin by this discrimination was substantial and costly.

Every essential element necessary to the establishment of Martin's claim has been resolved both by the Commission and by the District Court, in favor of Martin and against Southern Pacific Company.

The inexplicable conclusion of the Commission, which was held by the District Court to be contrary to the Interstate Commerce Act, that on the facts so found Martin was not entitled to any relief, will be discussed in connection with our consideration of the briefs of the two appellants.

THE BRIEF OF APPELLANT, INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission is a party in this case, not by virtue of any interest in the subject matter, but solely by virtue of statutory necessity. Title 28, Section 2322, U.S.C.A., provides that an action to set aside an order of the Interstate Commerce Commission shall be brought by or against the United States. In this particular case the United States, through the Attorney General, filed an answer but did not participate further before the District Court and has taken no appeal from the District Court decision. The Commission, however, has become an active and biased advocate of the railroad.

The brief of the Commission contains, after a statement as to jurisdiction, a statement of the case. This statement is inaccurate in the following respects:

(1) It states (p. 5) that the order of the Commission is "here under attack," whereas this appeal is by the railroad and the Commission to sustain the order of the Commission and attacks and tries to upset the judgment of the District Court.

(2) The statement describes the conclusions of the Commission as "ultimate finding" (p. 5 and 8), thus adopting the device used by the appellant, Southern Pacific Company, of attempting to twist legal conclusions of the Commission into findings of fact. This device is used throughout the briefs of both appellants. In the Commission brief on page 8 the words "findings of ulti-

mate fact” and “ultimate finding” both appear in the Specification of Errors, and the Commission states to this Court that the Court below could do no more than determine whether the Commission’s “ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings.”

The report of the Commission is set forth in the record at pages 108 to 126, inclusive. It contains 17 pages of findings of fact. After discussion of the facts for 17 pages, the report contains a heading, “Conclusions”, and under this heading the Commission concluded as a matter of law that the defendant railroad had not been shown to have unduly favored shippers other than Martin, and Martin had failed to establish a violation of the Interstate Commerce Act, and had failed to present evidence sufficient to support an award of reparation. These conclusions received detailed attention by Judge Solomon in his opinion (R. 61-73 inclusive), and more particular reference will be made to them in our discussion of the brief of Southern Pacific Company.

In the brief of the Commission following this misdescription of these conclusions of law is an argument concerning the scope of judicial review of Commission orders. This contains a discussion of cases of the Supreme Court of the United States and other courts, referring generally to the nature of the judicial function in reviewing orders of administrative tribunals. The discussion does not inform the Court of the existence of the Administrative Procedure Act of June 11, 1946,

(Title 5 U.S.C.A., Sections 1001-1011). The judicial review section of this Act (Section 1009) grants to any person suffering legal wrong because of any agency action, or aggrieved thereby, judicial review thereof. The reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or, (2) not supported by substantial evidence. This is the nature of the review to which Martin was entitled in the District Court under this Act and under the decision of the Supreme Court of the United States in *U.S. v. I.C.C.*, 337 U.S. 426, to which reference is made in the statement as to jurisdiction in the brief of the appellant Commission.

The nature of the judicial review to which a party, aggrieved by an order of the Interstate Commerce Commission, is entitled, is delineated by Judge Solomon in his opinion in this case, which we have heretofore quoted in part, and also by Judge Magruder in *N. Y. Central R. Co. v. U.S.*, heretofore referred to in this brief. We see no occasion for further elaboration on the nature of the review to which Martin was entitled or the duties of Judge Solomon as a reviewing judge. Judge Solomon determined that the findings of fact of the Commission were based upon substantial evidence and that the conclusions of law of the Commission were arbitrary and capricious and not in accordance with law and not supported by substantial evidence.

The brief of the Commission next proceeds with a recital of portions of evidence in the record, upon the

basis of which the Commission made its findings of fact. This recital is of little assistance to this Court, since the Commission is in no wise attacking its own findings of fact contained in its report. We desire, however to correct several inaccuracies in this recital of the evidence.

The Commission states in effect (p. 26) that the Freight Traffic Manager of Southern Pacific Company testified that the movement of traffic out of the Martin Brothers plant ranged from as little as 17 cars a month to over 100 cars a month. The brief neglects to state that this witness corrected this statement before leaving the witness stand (R. 632-633), stating, "As a matter of fact I'm incorrect in my statement because it was in the month of April, 1945, when Wilson Timber Company owned the mill. I'm sorry. I didn't intend to do that. I will give you the minimum number of shipments that Martin shipped in the time he was in control, if you want."

On page 28 the Commission states that the evidence shows that there was a "critical shortage" of cars on the Southern Pacific, "a fact admitted by appellee's president". Southern Pacific's own records showed no critical shortage at any time during the complaint period. As Judge Solomon pointed out, during the many months of the complaint period, according to the evidence Southern Pacific had submitted, there was no shortage of box cars. In addition, the president of Martin was speaking (R. 177-178) only about his company's being shorted and not about Southern Pacific's being short of

cars. By no stretch of the imagination can the testimony of the president be construed as indicating or implying a critical or other shortage of cars on the lines of Southern Pacific. He was plainly speaking about the failure of Southern Pacific to deliver cars to his plant at Oakland.

On the following page (p. 29) the Commission refers to demurrage rules and regulations, impliedly suggesting that demurrage was charged to Martin, whereas there is not one iota of evidence in the entire record of any demurrage charged against Martin, and it must be presumed that appellant, Southern Pacific, would have produced any such evidence favorable to its cause, if any existed.

On page 29 the Commission states that the record shows that Martin was furnished all the cars for which it placed specific orders during the nine-month period covered by the complaint. This same theme runs throughout the brief of Southern Pacific, expressed in different fashion on different pages, but all intended to induce this Court to believe that no requests for cars were made by Martin which were not recorded on a written order form either by an agent of Southern Pacific or an employee of Martin. In answer to this contention it should be stated, in the first place, that there is no statutory provision in the Interstate Commerce Act, or otherwise, that requests for cars must be anything other than "reasonable". Southern Pacific admittedly had no tariff schedule or rule of any kind requiring written orders for cars, and admits having filled many and possibly practically all requests of shippers for cars by

phone or oral requests of one kind or another. Southern Pacific admits having delivered to the siding of Martin during the complaint period, pursuant to requests of one kind or another made by Martin, a total of 664 cars, or an adjusted total of 593 cars, while asserting that Martin only ordered 565 cars, and that written car order forms in possession of Southern Pacific, but not in the record in this case, show requests during this period for only said 565 cars.

The record conclusively shows that cars were furnished to Martin during the complaint period without any reference whatsoever to the so-called specific order forms continually referred to by Southern Pacific. To begin with, at no time during the complaint period did Southern Pacific spot on Martin's track any specific car in response to any particular written form. Mr. Bogan, the Southern Pacific agent at Oakland, testified (R. 638):

“Q. Did they know it at Eugene, what cars Martin Box could have?

A. Yes, most of the time they did. That's what we were doing, called Eugene lots of times to find out how many we were going to get.

Q. Then when you found that out, an order would be placed?

A. Yes.

Q. Is that right?

A. That's right.”

Mr. Bogan further testified (R. 638), “while I was down at the mill or something like that, they wanted certain cars, then I'd make out the order when I got up to the depot and I'd put the order number and send it in. The orders were sent to the Eugene office.”

The next step in this order form process has been described by Mr. J. R. Robinson, Special Clerk, Bureau of Transportation Research, Southern Pacific (R. 566-590), who in January, 1948, after the complaint in this matter had been filed with the Commission, came to Oregon and studied these forms. He said he took the list of cars placed on the tracks of Martin and these forms and by a process of "counting" two for one and three for one made the two jibe. For example, he was asked (R. 574):

"Q. In each of these cases, did you check the original car order before deciding how the reefers should be counted, is that right?" and he answered:

"A. That's right."

Again (R. 575) he was asked:

"Q. Order 381, five reefers furnished. How did you count the first three?"

And the answer was:

"A. I broke them down a little different from that. The first two I counted as one, the next two as one and then the next fella I threw in with the other six cars and I counted those as two cars."

Further with reference to these forms is the testimony of this witness as to their alteration by employees of Southern Pacific. We quote from Mr. Robinson's testimony (R. 586-587) as follows:

"Q. (By Mr. Schafer) I just have one question or so, Mr. Robinson. Refer, please, to the original of what you call a car order for the date June 16th. I note that it shows the order placed June 16, but originally when you came to the place where you show the cars applied to fill the order, it shows that that car was actually furnished on the 14th. Then

later someone has scratched out in blue pencil the 14th and written in there 'spotted 11 a. m., 18th'. Do you know anything about that?

A. That's none of my writing. It was on there.

Q. I note throughout this sheaf of original car orders notations in blue pencil; you don't know who put those notations in there, do you?

A. I believe the auditors of the Pacific Car Demurrage Bureau—they are required to go to the various stations on the railroad and check the preparation of the car demurrage sheets and also the underlying documents of the car orders to see that agents are complying with the preparation of those documents. I believe that was an auditor's marks."

The Commission found in its report (R. 119-120) with respect to these "orders" as follows:

"Under normal conditions it is the practice for shippers to order the specific number of cars wanted, and therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day."

Previously the Examiner had made the same finding in identical language with that of the Commission, and Southern Pacific filed exceptions to this finding as follows:

"To the finding of the Examiner that it was the usual practice of complainant's employee to ascertain from defendant's office at Eugene how many cars had been assigned to complainant and then place complainant's order only for cars so assigned (last sentence of last full paragraph on sheet 6). This exception is made on the ground that such finding is unsupported by the evidence *which only showed this practice to be occasional . . .*" (R. 12; Emphasis supplied).

And again there is the undisputed evidence in the record that Mr. Bogan sent the order forms to Eugene, and that the cars supplied were "counted" against these forms, but at the same time a large number of empties came into Oakland from south of Oakland, Roseburg, etc. and were placed on Martin's spur; and as to these cars there is no evidence in the record of any "specific orders" being in existence.

Also during the complaint period cars loaded with materials destined for use in the plant of Martin at Oakland (to the number of not less than 11 according to Southern Pacific's Exhibit No. 42 - R. 818) were placed for unloading on Martin's track and were appropriated for re-loading to transport boxes or lumber to Martin's customers. There is no pretense that these cars were "applied" or "counted" or otherwise considered in response to any "specific car orders" or that the appropriation of these cars was not a reasonable request for their use.

It ill behooves the Commission, an agency of the United States, to state to this Court (Commission Brief, page 29) that the record shows that Martin was fur-

nished all the cars for which it placed specific orders during the nine-month period covered by the complaint, when the Commission in the official report in this same matter has found and determined that these "specific orders" refer to written car order blanks, which "were to a large extent nothing more than a written confirmation, for the defendant's records; that the complainant wanted the cars that had been assigned to it for that day" (R. 119) and when the Commission in this same matter has officially concluded that after June 30 in the complaint period "more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant" (R. 124-25).

The trial judge went into this situation in detail and concluded: (R. 65)

"I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.

"The Commission found that, during the complaint period, plaintiff had orders for and could have operated at capacity except for the lack of freight cars; that the plaintiff required 13 freight cars a day to operate at capacity. The Commission also referred to the testimony of one of the plaintiff's witnesses who testified that the quota of plaintiff was only 5 cars a day, the same that had been assigned to the former owner who only operated a lumber mill and had no box manufacturing facilities, but that plaintiff's quota would be raised to 10 cars a day."

The Commission in the brief next misnames its conclusions of law as "ultimate finding of fact" (p. 30), and then sets forth the testimony before the Examiner of Mr. Nelson (Brief p. 31), concerning the lack of cars during the complaint period: "why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth and otherwise." The Commission assigns no reason why Mr. Nelson's testimony to this effect should have more evidentiary value than that of Mr. J. B. Egan, of the Transportation Research Bureau of Southern Pacific, who testified before the Commission on April 30, 1947, (R. 791-792): "Well, the information that I am able to obtain right at the present time, particularly in the handling of lumber in the State of Oregon, there is no shortage of cars on Southern Pacific at the present time."

Finally the Commission in its brief (p. 32) winds up with the astounding statement that the record fails to show that the appellee was subjected to competition since it produced only boxes and was not engaged in the sale of lumber as such, and in the absence of proof of competition and allegation of undue prejudice cannot be sustained.

The record abundantly shows and the Commission had previously found (R. 122-124 - see also Exhibit 11 - R. 775) that during the complaint period Martin was producing, transporting and selling lumber, requiring during this period 50 cars per month and being shorted during this period 114 cars for rotary cut lumber and 65 cars for sawn lumber. It is difficult to understand how

or why the Commission should suggest to this Court at this time that Martin was not engaged in manufacturing and transporting and selling lumber as well as boxes.

Furthermore, under the law discrimination in favor of an immediate competitor of a shipper is not the only discrimination prohibited by the Interstate Commerce Act. As was stated by the Supreme Court of the United States in the case of *U.S. v. B. & O. R. Co.*, 333 U. S. 169, 68 S. Ct. 494, "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at *wiping out discriminations of all types*, *State of New York v. United States*, 331 U.S. 284, 296, 67 S. Ct. 1207, 1213, and language of the broadest scope has been used to accomplish all the purposes of the Act. *United States v. Pennsylvania R. Co.*, 323 U.S. 612, 616, 65 S. Ct. 471, 473, 89 L. Ed. 499." (Emphasis supplied).

In this statement concerning competition the Commission mis-states the facts and mis-applies the law.

THE BRIEF OF APPELLANT, SOUTHERN PACIFIC COMPANY

The appellant, Southern Pacific Company, in its brief before this Court, as did the Commission in its brief, adopted the device of designating the conclusions of law in the report of the Commission as findings of fact. This device is used repeatedly throughout the brief of this appellant, and the brief goes so far as to urge the doctrine of "administrative finality" (Brief p. 14) to these conclusions of law.

After an extensive hearing before the Examiner, the Examiner made a comprehensive proposed report (R. 84-106, inclusive). Upon exceptions to this proposed report by appellant, Southern Pacific Company, and after oral argument, the Commission itself made a comprehensive report (R. 108-126, inclusive). The Commission did not find the facts to be different in any essential from those found by the Examiner, but as Judge Solomon stated in his opinion (R. 56):

"Except for the findings of the Commission above quoted under the heading, 'Conclusions,' the statement of the evidence and the findings of the Examiner were practically identical to those of the commission. The Examiner recommended an award of reparations and the Commission dismissed plaintiff's complaint."

The Commission commenced its report with the statement, "Our conclusions differ from those recommended by the examiner." (Second sentence of report - R. 108).

There were two issues before the District Court. One was to determine whether upon the whole record the findings of fact made by the Commission had a substantial basis in the record, or were, in the words of the Administrative Procedure Act, "unsupported by substantial evidence". The record demonstrated beyond peradventure that the findings of fact of the Commission, which were practically identical with those of the Examiner, were supported by substantial evidence, and at no place in the brief of appellant, Southern Pacific, was any showing made that the facts as so found were not supported by substantial evidence.

The only other issue was whether the conclusions of the Commission as a matter of law logically followed the facts found by the Commission, or in other words were these conclusions contrary to law. This issue was not met in the brief of Southern Pacific. Judge Solomon with great care and in detail examined the conclusions of the Commission (R. 57-73). We will consider these in the same order as Judge Solomon considered them.

The first conclusion is that for a time Martin received practically all the cars for which there were written car orders, and later received more cars than were requested by written orders. As Southern Pacific in its brief admits (p. 9, 43, 45 etc), written requests for cars were unnecessary and oral requests for cars were just as reasonable; and as Judge Solomon stated, the findings of the Commission showed continuous requests to secure additional box cars to partially satisfy Martin's urgent need for such cars (R. 58). Hence, this conclusion of

the Commission has no bearing on any issue in the case and, "if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law" (R. 61).

The next conclusion of the Commission is that Martin desired, required and attempted to secure additional cars and, as stated by the trial judge, this conclusion is supported by substantial evidence and is, of course, favorable to Martin's claim for reparation.

The next conclusion of the Commission is that Southern Pacific made reasonable and sometimes successful efforts to furnish additional cars. Judge Solomon demonstrated that there was no substantial evidence to support this conclusion since the only evidence in the entire record was that on several occasions an employee of Martin, on days when no cars were assigned to Martin, induced Southern Pacific's employees to reconsider and assign a car for Martin's plant, and a reasonable effort implies conduct in accordance with the statutory duty of Southern Pacific not to prefer any particular person, company, locality or territory, and likewise its statutory duty in case of a car shortage to treat shippers fairly, if not identically. Hence, the only effort shown in the record to secure more cars is that of Martin's employees, not of Southern Pacific's employees.

The next conclusion of the Commission is that Martin was unable to fill orders of its customers by reason of Martin's inability to secure cars. The evidence amply supported this conclusion.

The next conclusion of the Commission is that during 1947 there was in general a shortage of freight cars, and the Court commented that the evidence upon which this conclusion was based supported the conclusion.

The next conclusion of the Commission is that it was not shown that the Southern Pacific unduly favored shippers other than Martin. Judge Solomon demonstrated from the findings of fact of the Commission, among them that Southern Pacific furnished other shippers an average of 80 per cent of the cars required by them, and shippers at competitive points all cars desired by them, and that Martin could have operated at capacity except for the lack of freight cars, and required 13 cars a day to operate at capacity, and received an adjusted total of an average of 3.1 cars each day, that considering the whole record there was no substantial evidence upon which the Commission could have based this conclusion.

The next conclusion is that Martin failed to establish any violation of Sections 1 and 3 of the Interstate Commerce Act. The Judge determined that this ultimate conclusion, in view of the whole record, was not supported by substantial evidence and was contrary to law.

The words of the Supreme Court of the United States in the case of *U.S. v. B. & O. R. Co.*, *supra*, that the Interstate Commerce Act and all amendments to it have aimed at wiping out discriminations of all types, amply confirm the soundness of Judge Solomon's decision in this respect.

The final conclusion of the Commission is that the evidence falls short of the requirements in a proceeding of this character to support an award of reparation. As to this conclusion Judge Solomon stated that the record does contain evidence of damage supporting an award of reparation. The findings of the Commission, at pages 121 to 124, inclusive, of the record, amply demonstrate the soundness of this statement of the Court.

Before ourselves concluding this brief, we desire to call to this Court's attention a few of the many misstatements of fact occurring in the brief of Southern Pacific.

This appellant states (p. 51) that Martin Brothers "candidly shows that it cancelled certain of the car orders placed by it during the complaint period." There is no evidence in the record that Martin at any time cancelled any car order, the evidence on the contrary being that every possible effort was devoted to the obtaining of additional cars. (See, however, the testimony of Martin's president (R. 344), "if they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through.")

The only orders cancelled were those of customers of Martin whose orders Martin could not fill because of lack of cars (R. 182; R. 113).

Southern Pacific repeats in its brief the several times discredited contention (p. 48) that Martin held 200 cars for periods ranging from three to eight days during the complaint period.

The Commission found (R. 120) that most of the cars placed on Martin's track remained only one or two days, and:

"One car was on hand on 7 days, 2 cars were on hand on 6 days, 11 cars were on hand on 5 days, 22 cars were on hand on 4 days, and 56 cars were on hand on 3 days. The complainant indicates that these may have been cars that were restricted for loading to particular destination areas for which it had no immediate traffic available."

When the same contention was made before the trial court an analysis of the exhibits of Southern Pacific was made and Judge Solomon showed (R. 72):

"2. A great majority of the cars were moved out within 2 days.

3. When a car was held for more than 3 days, from 13 to 23 other cars were moved in, loaded, and moved out within such period.

4. Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than 3 days, when the daily 7 a.m., track check was made.

5. During the months of August and September, 35 per cent and 60 per cent of all cars furnished plaintiff were not box cars, but were refrigerator, stock, flat or gondola cars. The same situation obtained, to a lesser extent, in other months during the complaint period. A number of these cars were of limited value to the plaintiff. The automobile and refrigerator cars were restricted to particular destinations and the refrigerator cars could only be used for the shipment of boxes and they could only be loaded by hand."

Yet Southern Pacific would ask this Court to believe that 200 cars were held by Martin for periods up to eight days for lack of business.

CONCLUSION

This is essentially not a difficult case. The facts are relatively simple and undisputed. The reasons at a time when cars were in short supply for the discrimination practiced by Southern Pacific against Martin are obvious

First, Martin is located on Southern Pacific's Siskiyou Line, which Southern Pacific's witness, Poole, testified (R. 466) is a costly line to operate because of its rate of grade. Thus, the Cascade Line, which was built at a cost to Southern Pacific in excess of Forty Million Dollars in order to eliminate the difficulties in operating over the Siskiyou Line, is the "favorite line" of Southern Pacific and is one of the reasons why the service is a "little slower" on the Siskiyou Line.

Second, Southern Pacific was fully aware that Martin was engaged in the manufacture of products that could be reasonably shipped by rail only; that Southern Pacific was the only railroad which served Martin's Oakland plant and that if Southern Pacific did not transport Martin's products no one else could. There was no competition.

Third, as Southern Pacific's Freight Traffic Manager asserted to Martin's president in one instance when the president was complaining about not receiving cars, he was asked if he expected Southern Pacific to take cars from other shippers with a "good heavy pay-bottom load" and give them to Martin for wirebound boxes. In a standard box car, about 40,000 pounds of boxes or

about 80,000 pounds of lumber can be loaded (R. 114-115).

Fourth, Southern Pacific desired a long haul over its lines to Ogden, rather than the short haul to Portland. On July 16, 1947, the District Freight Agent of Southern Pacific at Medford wrote to Martin at Oakland (Exhibit No. 1, R. 703) telling Martin, "We must have our long haul via Ogden if we are to prosper and extend you satisfactory service."

However obvious the reasons for the discrimination, the discrimination itself is prohibited by the Interstate Commerce Act, and the judge of the District Court was in every respect correct and should be affirmed.

Respectfully submitted,

GEORGE L. QUINN, JR.,
815 - 15 Street, N.W.,
Washington 5, D. C.

IRVING RAND,
DONALD A. SCHAFER,
Public Service Building,
Portland 4, Oregon.

Attorneys for Appellee.

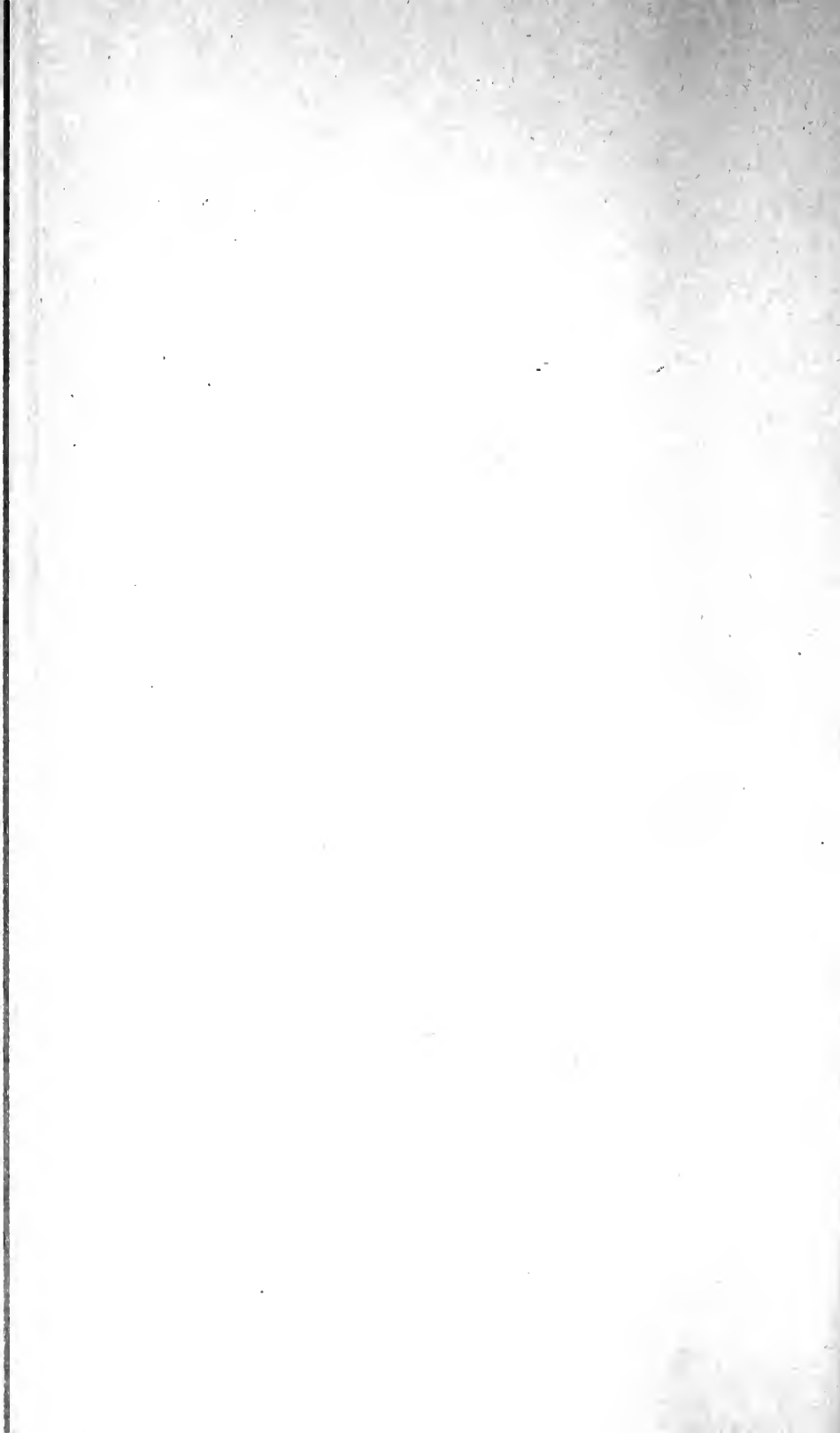
Certificate of Service

I hereby certify that I have this day served the foregoing brief upon counsel for appellants by mailing by first class mail three copies thereof addressed to Edward M. Reidy and Samuel R. Howell, Interstate Commerce Commission Building, Washington 25, D. C. and one copy thereof addressed to William L. Harrison, Interstate Commerce Commission, 1056 Flood Building, San Francisco 2, California, and one copy thereof to James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California, and by delivering three copies to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

Dated at Portland, Oregon, this 12th day of May, 1954.

IRVING RAND

*Of Counsel for Appellee,
The Martin Brothers Box Company.*



No. 14106 ✓

*See also
Vol. 2853*

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *Ad Litem* for LEW SUEY
YET, Also Known as LEW THEW YUT,
Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLANT.

BRENNAN & CORNELL,
458 South Spring Street,
Los Angeles 13, California,

Attorneys for Appellant

FILED

JAN 29 1954

PAUL P. O'BRIEN

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171 **CLERK**

1111 11 11

1111

1111 11 11

TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	2
Statement of points.....	4
Résumé of the evidence.....	4
Argument.....	8
Conclusion	23

TABLE OF AUTHORITIES CITED

CASES	PAGE
Acheson v. Yee King Gee, 184 F. 2d 382.....	23
Baltimore & O. R. Co. v. Postom, 177 F. 2d 53.....	11
Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 51 S. Ct. 453, 75 L. Ed. 983.....	11
Chung Vig Tin v. Nagle, 45 F. 2d 484.....	16
Delaney, Ex parte, 72 Fed. Supp. 312; aff'd, 170 F. 2d 239.....	21
Fleming v. Palmer, 123 F. 2d 749; cert. den., 316 U. S. 662, 65 S. Ct. 942, 86 L. Ed. 1739.....	10
Foran et al. v. Comm. of Internal Revenue, 165 F. 2d 705.....	11, 12
Go Lun v. Nagle, 22 F. 2d 246.....	12, 13
Grace Bros. v. C. I. R., 173 F. 2d 170.....	10, 11
Gung You v. Nagle, 34 F. 2d 848.....	14, 21
Gutowsky v. Jones et al., 178 F. 2d 60.....	11
Johnson v. Damon, 16 F. 2d 65.....	13, 16
Lassiter v. Guy F. Atkinson Co., 176 F. 2d 984.....	10
Lau Hu Yuen v. United States, 85 F. 2d 327.....	22
Lee Hin v. United States, 74 F. 2d 172.....	15, 21
Lee Mon Hong v. McGranery, 110 Fed. Supp. 682.....	20
Louie Pay Hok v. Nagle, 48 F. 2d 753.....	16
Nagle v. Jin Suey, 41 F. 2d 522.....	16
Nee v. Main St. Bank, 174 F. 2d 425; cert. den., 70 S. Ct. 69, 338 U. S. 823.....	10
O'Connell v. Ward, 126 F. 2d 615.....	22
Orvis v. Higgins, 180 F. 2d 537; cert. den., 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595.....	12
Quan Toon Jung v. Bonham, 119 F. 2d 915.....	14, 15

San Francisco Assn. for the Blind v. Ind. Aid for the Blind, Inc., 152 F. 2d 532.....	11
State Farm Mut. Automobile Ins. Co. v. Bonacci, 111 F. 2d 412	11
Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 137 F. 2d 176	10
Toy Teung Kwong v. Acheson, 95 Fed. Supp. 745.....	23
United States ex rel. Ng Kee Wong v. Day, 44 F. 2d 406.....	16
United States ex rel. Ng Lin Suey v. Day, 49 F. 2d 471.....	16
United States v. United States Gypsum Co., 68 S. Ct. 525, 333 U. S. 364, 92 L. Ed. 746; reh. den., 68 S. Ct. 788, 333 U. S. 869, 92 L. Ed. 1147.....	9
United States v. Wong Gong, 70 F. 2d 107.....	22
Ward v. Flynn, 74 F. 2d 145.....	22
Weedin v. Lee Gon, 47 F. 2d 886.....	16
Wong Gan Chee v. Acheson, 95 Fed. Supp. 816.....	23
Wong Kam Chong v. United States, 111 F. 2d 707.....	15, 22
Wong Tsick Wye et al. v. Nagle, 33 F. 2d 226.....	14
Young Len Gee v. Nagle, 53 F. 2d 448.....	16

RULES

Federal Rules of Civil Procedure, Rule 52.....	10
Federal Rules of Civil Procedure, Rule 52(a)....	8, 9, 12, 14, 15, 23

STATUTES

Act of April 14, 1802.....	1
Act of February 10, 1855.....	1
Act of May 24, 1934, Sec. 1.....	1
Act of October 14, 1940, Chap. 876, Title I, Subchap. 5, Sec. 503 (54 Stats. 1171).....	2

	PAGE
United States Code Annotated, Title 8, Sec. 903.....	2, 23
United States Code, Title 8, Sec. 153.....	12
United States Code, Title 8, Sec. 282.....	15
United States Code, Title 8, Sec. 601(g).....	1
United States Revised Statutes, Sec. 1993.....	1

TEXTBOOK

2 Barron & Holtzoff, Federal Practice and Procedure, Sec. 1135, p. 849	10
---	----

No. 14106

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *Ad Litem* for LEW SUEY
YET, Also Known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLANT.

Jurisdictional Statement.

Plaintiff, Lew Suey Yet, also known as Lew Thew Yut, filed his petition in the Court below, claiming to be a citizen or national of the United States, pursuant to the provisions of Section 1993, Revised Statutes of the United States. (Acts of April 14, 1802, and February 10, 1855, before amended by Act of May 24, 1934, Sec. 1, 8 U. S. C. A. 601(g).) (This Act has since been amended in 1952, but was the law applicable at the time plaintiff was born.) Such act in as far as applicable to plaintiff reads as follows:

“All children heretofore born or hereafter born out of the limits and jurisdiction of the United States,

whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States.”

Jurisdiction is conferred upon the Court below by the Act of October 14, 1940, Ch. 876, Title I, subchapter 5, Section 503, 54 Stat. 1171 (8 U. S. C. A., Sec. 903). This section in as far as it is applicable to plaintiff provides as follows:

“If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of the United States for the District of Columbia or in the District Court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a National of the United States. * * *.”

This statute was repealed in 1952, but was the pertinent jurisdictional law in effect at the time plaintiff's complaint was filed herein.

Statement of the Case.

Plaintiff, Lew Suey Yet, also known as Lew Thew Yut, by and through his guardian, Lew Wah Fook (his alleged father) filed in the United States District Court for the Southern District of California, Central Division, a petition and amended petition seeking a declaratory judg-

ment of United States citizenship. The action was brought pursuant to the statute then in effect, to-wit: Section 503 of the Nationality Act of 1940 (8 U. S. C. A.). The appellant claims to have acquired United States citizenship at the time of his birth, in accordance with the United States Nationality Statute then in effect. The appellant claims to be the lawful blood child of Lew Wah Fook. It was conceded by the defendant-appellee at the time of trial that Lew Wah Fook, the alleged father, was and now is a citizen of the United States. [Tr. 22.]

Lew Wah Fook testified that he arrived in the United States the latter part of 1923 [Tr. 22] and made two trips to China, but returned to the United States each time. [Tr. 23.] The record discloses that, except for those trips to China, he has been a permanent resident of the United States since July of 1923. He testified that he made his first trip to China in August of 1929 and returned April 3, 1931, and that he departed on the second trip in November of 1932 and returned in May of 1935. [Tr. 23.]

Lew Wah Fook further testified that plaintiff arrived in the United States port of entry in 1951 with his two older brothers, and that the said two older brothers were admitted to United States citizenship but plaintiff-appellant herein was detained by the Immigration and Naturalization authorities [Tr. 38-39], pending a determination of his status. The Board of Special Inquiry of the Immigration and Naturalization Service held a hearing at San Pedro, California, on June 28, 1951, and determined that appellant herein was not a citizen of the United States and was not admissible to the United States as such. Thereafter the Board of Immigration Appeals

on July 1, 1952, affirmed this decision, excluding appellant from United States citizenship. Thereafter on July 10, 1952, appellant filed his petition in the Court below, by and through his guardian *ad litem*, Lew Wah Fook, to have his claim of citizenship determined by the lower Court. [Tr. 13, 14.]

The cause came to trial in the Court below without a jury. The appellant, his alleged father, Lew Wah Fook, and two witnesses testified concerning the claimed relationship of appellant to his father, Lew Wah Fook. The defendant-appellee presented no witnesses. The lower Court found for the defendant-appellee, and it is from this judgment that the appellant prosecutes this appeal.

Statement of Points.

I.

The Court erred in not declaring the plaintiff, Lew Suey Yet, also known as Lew Thew Yut, a citizen of the United States, in view of the direct testimony of witnesses which was not contradicted, nor were any material inconsistencies shown on cross-examination, and the complete lack of any evidence to the contrary adduced or introduced by the defendant.

Résumé of the Evidence.

Lew Wah Fook testified that he was born January 18, 1913, in Canton, Toy Shan, China, in Lung Uck Village [Tr. 21]; that on his first trip to China from the United States in 1929 he married Huie Shee Yee [Tr. 23]; that his marriage was in the same village where he was born, and was according to the Chinese marriage customs and ceremonies; that his oldest child is Lew Mon Soong, born November 9, 1930, and that his next son is Lew Mon Hing

or Hung, born December 2, 1933 [Tr. 24]; that he had a third child born September 9, 1935, named Lew Suey Yet; that the portion of the name of Yet can also be spelled Yut. [Tr. 24-25.] This latter child, of course, is the appellant herein. He also stated that a fourth child was born December 17, 1946, and that his name was Lew Mon Tang. He testified that his sons Lew Mon Soong and Lew Mon Hing have been admitted to the United States and are in Los Angeles, California, and that his third son, appellant herein, was sitting at the Council table when he, Lew Wah Fook, was testifying. [Tr. 25-26.] He testified that upon his return from his second trip to China he gave information to the Immigration and Naturalization Service that he had two male children, Lew Moon Seung and Lew Moon Hin [Tr. 29], and that his wife was seven months pregnant. [Tr. 29.]

Lew Wah Fook continued to testify that when he left China to return to the United States at the conclusion of his second trip that his older two children were in the village living with his wife, the mother of said two sons, and that he had not seen them since said second trip, until February, 1946 [Tr. 34], when he saw them in the same village and the same house that he had occupied when in China; that this visit was occasioned by a 90-day leave given him by the United States Army when he went back to the village to visit his family in China, they were living in the same house, in the same village where his family had lived when he made both the first and second trips to China. [Tr. 36.] He testified in detail about the other son at page 37 of the Transcript, and that he saw his son, plaintiff herein, for the first time when he went to the village on his United States Army 90-day leave. [Tr. 38.] He identified appellant herein

as the son he saw upon his arrival to the United States in 1951 as the same son he saw in China in 1946 when he had his Army furlough. [Tr. 39.]

Lew Mon Soon was called as a witness for appellant and testified that he was born November 19, 1930, in Lung Uck Lee, China, and arrived in the United States May 27, 1951 [Tr. 40]; that from the time of his birth he lived in the same village until going to Hong Kong, which was about a year before he left for the United States; that his brothers, Lew Mon Hing and appellant, Lew Suey Yet lived with him at all times in the village and that the three boys went to Hong Kong together [Tr. 41]; that his father was Lew Wah Fook, the man that came to Court with him, and that his mother's name was Huie Shee Yee, and that his brothers, Lew Mon Hing and Lew Suey Yet lived with the mother in their home in the village until his mother died. He identified his next brother, Lew Mon Hing as being in the witness room with him at the time of the trial, and the appellant Lew Suey Yet, as his brother, sitting at the counsel table, and that he had played with appellant since he could remember, and recalled seeing his father in the village in 1946. [Tr. 43.]

Lew Mon Hing testified as a witness for plaintiff, it being conceded by the defendant-appellee that both Lew Mon Hing and the previous witness, Lew Mon Soon were admitted to the United States as American citizens through derivative citizenship of the father, Lew Wah Fook, guardian of plaintiff herein, effective July 1, 1952. [Tr. 52-53.] He testified that he was born in Lung Ock Village, China, and that his father's name was Wah Fook and his mother's Hui Shee, and that he had an older

brother, Lew Mon Soong, who testified the day before and exchanged places with the witness in the witness room. [Tr. 53.] He identified the witness, Lew Wah Fook, as his father, and that he has a younger brother, his No. 3 brother, Thew Yet, who was sitting at the counsel table next to Mr. Brennan. [Tr. 54.] He stated that he came to the United States with his brothers, Lew Mon Soong and plaintiff, Lew Suey Yet, and that the three brothers lived together in the home village and came to Hong Kong together; that he recalls seeing his father in 1946, and that his brothers, Lew Mon Soong and Lew Suey Yet were both living in the same village at the time his father was there, and that all were part of the same household. [Tr. 56-57.]

Plaintiff, Lew Suey Yet, testified that he desired to be a permanent resident, in the Southern District of California, Central Division of the Trial Court, and that his father was Lew Wah Fook; that this was the same person who had been in Court with him in the adjacent witness room; that his mother was Huie Shee Yee; that he was born in Lung Ock Li, September 9, 1935; that he came to the United States with his two older brothers, Lew Mon Soong and Lew Mon Hing; that prior to coming to the United States he had lived in the same village with his brothers and his family prior to coming to Hong Kong, and went to Hong Kong with the same two older brothers. [Tr. 60-61.] He stated he recalled seeing his father, Lew Wah Fook, in February of 1946, when he was about eleven years of age, in the home village and that the person he knew then as his father is the same person he identified in Court, and that the two brothers he mentioned in Hong Kong and his home village

are the same two he identified in the Trial Court. [Tr. 62.]

It thus appears from the uncontradicted testimony that Lew Wah Fook, the alleged father of appellant, made a positive identification of appellant, and that this was firmly corroborated by his two sons, Lew Mon Soong and Lew Mon Hing (admittedly blood children of Lew Wah Fook), who positively identified appellant as the boy they had known and grown up with in the home village, and that they accompanied appellant to Hong Kong, contemplating entry to the United States, and came to the United States with him. It is difficult to perceive how a stronger showing could have been made that the appellant was and is the blood child of Lew Wah Fook.

Argument.

It is respectfully submitted that the Findings of Fact of the Trial Court are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. It therefore follows that the Court erred in pronouncing its judgment that appellant was not a national and/or citizen of the United States by reason of the uncontradicted testimony of appellant, his alleged father Lew Wah Fook, and his two brothers (admitted by the defendant-appellee to be the lawful blood children of Lew Wah Fook, guardian of appellant herein).

The particular portion of the Findings of the Trial Court which appellant claims were "clearly erroneous" appears at page 14 of the Transcript of the Record, as follows:

"VIII.

"That the credibility of the witness Lew Wah Fook, alleged father of the plaintiff herein, has been

so impeached that, as a result, the Court does not believe the testimony of the said plaintiff, the witness Lew Wah Fook, or other witnesses, and there is insufficient credible evidence to support plaintiff's claim that he is a citizen of the United States.

“IX.

“That the plaintiff herein was born in China, but that said plaintiff is not the son of Lew Wah Fook, and is not a citizen of the United States.”

The extent of this Court's Appellate review of the Findings of Fact of the Trial Court is described by Rule 52(a) of the Federal Rules of Civil Procedure. The United States Supreme Court in discussing this Rule, stated in the case of *United States v. United States Gypsum Co.* (1948), 68 S. Ct. 525, 542, 333 U. S. 364, 395, 92 L. Ed. 746, reh. den. 68 S. Ct. 788, 333 U. S. 869, 92 L. Ed. 1147.

“Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury, this Court may reverse findings of fact by a trial court where ‘clearly erroneous.’ The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

“A finding of fact is clearly erroneous if it is against the clear weight of the evidence.”

Fleming v. Palmer (C. A. 1), 123 F. 2d 749, 751 (cert. den. 316 U. S. 662, 65 S. Ct. 942, 86 L. Ed. 1739).

See also:

Nee v. Main St. Bank (C. A. 8, 1949), 174 F. 2d 425 (cert. den. 70 S. Ct. 69, 338 U. S. 823);

Lassiter v. Guy F. Atkinson Co. (C. A. 9, 1949), 176 F. 2d 984;

Grace Bros. v. C. I. R. (C. A. 9, 1949), 173 F. 2d 170.

In determining whether a Trial Court's finding is clearly erroneous the Appellate Court may examine all the evidence in the record, and upon reviewing a judgment as to the facts, an Appellate Court looks first to the Trial Court's findings and then to evidence in the record to ascertain whether the findings are “clearly erroneous”:

Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123 (C. C. A. 5, 1943), 137 F. 2d 176.

The interpretation of Rule 52 is discussed by Barron and Holtzoff, *Federal Practice and Procedure*, Vol. 2, Sec. 1135 at page 849, where they state as follows:

“Rule 52 plainly contemplates a review by the appellate court of the question whether there is substantial evidence to sustain the trial court's findings of fact. *Substantial evidence is not merely some evidence. It must be more than a mere scintilla.* It is evidence of such quality and weight as would justify a reasonable person in drawing the inference of fact made by the court.” (Emphasis ours.)

See also:

State Farm Mut. Automobile Ins. Co. v. Bonacci
(C. C. A. 8, 1940), 111 F. 2d 412;

Baltimore & O. R. Co. v. Postom, 177 F. 2d 53,
and cases cited therein.

It thus manifestly appears that this Court, in construing the Findings of the Trial Court, may examine all of the evidence and testimony to ascertain if said Findings were "clearly erroneous."

It has been held if a judgment is against the positive, uncontradicted and unimpeached testimony there is a violation of this rule.

Foran et al. v. Comm. of Internal Revenue (C. C. A. 5), 165 F. 2d 705, 707.

"Both under Rule 52(a) of the Rules of Civil Procedure, and well established equitable principles, we are not bound by the trial court's findings if we are of the view that they are against the great weight of the evidence."

Gutowsky v. Jones et al. (C. A. 10), 178 F. 2d 60, 65.

Unimpeached and uncontradicted testimony cannot be disregarded.

Chesapeake & Ohio Ry. Co. v. Martin, 283 U. S. 209, 216-217, 51 S. Ct. 453, 75 L. Ed. 983, 987-988;

Grace Bros. v. Commissioner of Int. Revenue
(C. A. 9), 173 F. 2d 170, 174;

San Francisco Assn. for the Blind v. Industrial Aid for the Blind, Inc. (C. A. 8), 152 F. 2d 532, 536.

In *Foran et al. v. Commissioner of Internal Revenue* (C. A. 8), *supra*, wherein the only evidence before the Trial Court was the testimony of one of the parties the Appellate Court said:

“We think the court’s refusal to follow the sworn testimony is contrary to law, and requires the setting aside of its fact-finding as it would that of a jury.”

Moreover, as stated by the Court of Appeals for the Second Circuit in,

Orvis v. Higgins, 180 F. 2d 537, 540 (cert. den. 71 S. Ct. 37, 340 U. S. 810, 95 L. Ed. 595),

“It follows that evidence sufficient to support a jury verdict or an administrative finding may not suffice to support a trial judge’s finding.”

We submit that in the case at bar the findings are “clearly erroneous” within the meaning of Rule 52(a), *supra*, in that they are against the clear weight of the evidence, which is all one way and which is positive, uncontradicted and unimpeached. We submit, further, that under principles laid down by this Court in many cases, a finding against appellant on this record would not withstand appellate review even if made by an administrative tribunal whose decisions are declared to be final by statute. (8 U. S. C. Sec. 153.)

In *Go Lun v. Nagle*, 22 F. 2d 246, 248, with regard to such a review this Court said:

“We fully appreciate the narrow limits of the jurisdiction of the courts on habeas corpus proceedings to review decisions of the immigration tribunals; but ‘the error of an administrative tribunal may, of course, be so flagrant as to convince a court that

a hearing had was not a fair one.' *Tisi v. Tod*, 264 U. S. 131, 44 S. Ct. 260, 68 L. Ed. 590. Such a case is presented here.

"A reading of the entire testimony of the three witnesses leaves not the slightest room for doubt that their relationship was fully established, and that the appellant is a citizen of the United States. A contrary conclusion is arbitrary and capricious and without any support in the testimony.

"In *Johnson v. Damon* (C. C. A.), 16 F. (2d) 65, the court considered discrepancies on which an excluding decision was based, more important than any disclosed by the present record and in reference to the excluding decision said 'The mind revolts against such methods of dealing with vital human rights.' That language might well be applied here."

The case of *Johnson v. Damon*, from which this Court quoted the forceful language just mentioned, involved two Chinese boys who sought entry as sons of a citizen who had died when they were infants. Their testimony was supported by that of a previously admitted brother and uncle. This appears to be an obviously weaker case than the instant appeal in that here we have the positive testimony of the alleged father and two previously admitted brothers. Despite the statutory limitations upon the power of the Court to review the administrative decision, the Court in that case was impelled to overturn that decision in the forceful language quoted by this Court in the case of *Go Lun v. Nagle*, 22 F. 2d 246, 248, *supra*.

In speaking of the rejection by administrative tribunals of uncontradicted and unimpeached testimony by the

appellant and his alleged relatives in *Gung You v. Nagle*, 34 F. 2d 848, 852, this Court said:

“The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses, either because of a fixed policy, to give a weight to a presumption of law far beyond the legislative intent, or because of a policy calculated to entrap the witness * * *.”

In conclusion, this Court held that the rejection of the evidence of the several witnesses was purely arbitrary. See also:

Quan Toon Jung v. Bonham (C. A. 9), 119 F. 2d 915;

Wong Tsick Wye et al. v. Nagle (C. A. 9), 33 F. 2d 226.

It seems obvious that an administrative finding of fact adverse to the appellants would not withstand even the limited review afforded on habeas corpus proceedings, under the foregoing decisions and many others to the same effect. Moreover, it is plain under the authorities hereinbefore cited that the power of appellate review of findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure is even broader than it is in the case of administrative findings which carry statutory finality. Consequently, we submit that the findings of the Court below are “clearly erroneous” within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

Furthermore, this Court, in considering appeals from judgments entered in judicial deportation proceedings under

former Section 282 of Title 8, United States Code, has held that uncontradicted and unimpeached testimony of witnesses in behalf of the defendant cannot be disregarded by the Trial Court.

Wong Kam Chong v. United States (C. A. 9),
111 F. 2d 707, 712;

Lee Hin v. United States (C. A. 9), 74 F. 2d 172.

We submit that the foregoing principles enunciated by this Court in reviewing administrative decisions and judgments in judicial deportation proceedings are applicable here by analogy. The scope of the appellate review under Rule 52(a) of the Federal Rules of Civil Procedure is at least as broad as in habeas corpus or judicial deportation proceedings. Here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The alleged father and his two admitted sons gave testimony directly upon the issue. No contradictory or countervailing evidence has been submitted. We submit that under the well settled principles mentioned above the findings of the Court below adverse to the claim of appellants is "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure.

With reference of the matter of alleged discrepancies in the testimony, it is submitted that in the main the discrepancies, if any, were on and concerned immaterial and collateral matters. The Trial Court seemed concerned about an alleged discrepancy with reference to the dates of the two older sons of Lew Wah Fook, namely. Lew Mon Soong and Lew Mon Hing, who admittedly have been admitted as sons of Lew Wah Fook. However, as pointed out by Mr. Brennan, attorney for appellant at

the time of the trial, this issue was immaterial and, at least up to that point, there had been no discrepancy as far as plaintiff-appellant is concerned. [Tr. 55.] Concerning this point the Trial Court stated:

“The Court: No, there has been no conflict as to the plaintiff yet.” [Tr. 56.]

It has been held by this Court that mere discrepancies do not necessarily discredit testimony, and that it must be understood in the light of reason on which it rests.

Louie Pay Hok v. Nagle (C. C. A., Cal.), 48 F. 2d 753;

United States ex rel. Ng Lin Suey v. Day, 49 F. 2d 471.

As a further general rule it may be stated that few easily explicable discrepancies on *collateral points* will not support a refusal to credit *strong affirmative evidence* of paternity.

United States ex rel. Ng Kee Wong v. Day, 44 F. 2d 406.

In the case of *Young Len Gee v. Nagle* (C. C. A., Cal.), 53 F. 2d 448, this Court pointed out that the discrepancies in testimony were so slight that a finding that the alien was not the son of an American born Chinese was arbitrary and capricious.

Other cases that hold that discrepancies alone are not sufficient to deny citizenship:

Chung Vig Tin v. Nagle (C. C. A.), 45 F. 2d 484;
Weedin v. Lee Gon, 47 F. 2d 886;

Nagle v. Jin Suey (C. C. A., Cal.), 41 F. 2d 522;
Johnson v. Damon, ex rel. Leung Fook Yung, 16 F. 2d 65.

Thus, in weighing the entire evidence submitted at the time of the trial it is respectfully submitted that any alleged discrepancies were immaterial and collateral, and as such should not have been considered by the trial court.

From a close scrutiny of the entire record and the reporter's transcript it appears that the main and sole point that the Trial Court found for the defendant-appellee is that appellant is in fact a male, yet was given at his birth the name of a female. It is submitted that by reason of the logical explanation of Lew Wah Fook and the positive testimony and identification of the two older brothers that the Trial Court erroneously indulged in conjectures rather than following the undisputed testimony and evidence.

Concerning the female name of the male appellant, he testified that he was subject to ridicule because of his name and that the other little children in his village said that it was a girl's name. [Tr. 64.] Apparently the first occasion in which the female character of appellant's name arose was under cross-examination of Lew Wah Fook when he was interrogated concerning information furnished the Immigration and Naturalization Service. At the time this information was furnished he testified that he *claimed* two sons and one daughter. [Tr. 70-71.] It may be recalled from the previous testimony of Lew Wah Fook that he stated he did not return to China from the United States after his second trip (until he saw his wife and children in China in 1946 when he received a 90-day leave from the United States Army), and that he had furnished information to the Immigration and Naturalization Service on the return to the United States from this second trip that he had two male children and that his wife was seven months pregnant. Thus it is readily

apparent that Lew Wah Fook was not present when the appellant was born. He testified that he received correspondence advising him that his wife had given birth to a child, and giving him the name and date of birth. From this name *alone*, which was a girl's name, he assumed that the child was a daughter. [Tr. 74.] He amplified this testimony to the effect that no one at any time advised him that the child born and given the girl's name was, in fact, a male. It is interesting to note that the Trial Court asked of the interpreter whether a similar situation in the interpreter's knowledge had arisen, namely, that a boy was given a girl's name. The interpreter replied in the affirmative and gave an explanation. [Tr. 74.] In order to shed some light on the feelings of the Trial Court that it was actually indulging in conjecture the Court states at page 75 of the Transcript:

"It is pretty near inconceivable."

Lew Wah Fook went on to say that he did not know that appellant was in fact a boy until he returned when he was in the Army in 1946, and that this fact made him very joyous and that while he was there he demanded of his mother an explanation as to why he had not been informed of the fact that the child, in fact, was a boy. He then advised the Court that his mother was a highly superstitious woman, and that by reason of a ritual common in China concerning the length of life of children, that appellant would apparently live longer as a girl than a boy. The mother of Lew Wah Fook, therefore, arbitrarily as the head of the family, gave appellant a girl's name, and instructed all the rest of the family not to tell him that it was a boy, and to either advise Lew Wah Fook that it was a girl or to keep quiet and not tell him

that it was in fact a male. [Tr. 76.] In furtherance of his explanation as to the appellant, he stated that when he ascertained the true sex of appellant he wanted to have an immediate ceremony and change the name to a boy's name. However, his mother again insisted that by reason of the superstitions and the rituals common in China the boy would have to reach the age of 18 before such a process could be undertaken. Otherwise, "his health would be in jeopardy." [Tr. 77.]

Concerning his information as to the birth of the child on continued cross-examination, he testified that he came back to the United States in July of 1935, and two or three months thereafter received a letter advising that a child was born, and in response to a question by the Court, stated the letter did not advise him whether it was a boy or a girl, and that the child that was born in 1935 is the same child that was named Lew Suey Yet, appellant herein. [Tr. 78.] He stated that when he returned home on his Army furlough in 1946 and found that he had three sons he was astonished as he had believed the youngest one was a daughter. [Tr. 80.] In response to a question by the United States Attorney as to what explanation was given to Lew Wah Fook he again explained the superstitions existing in China and that as his mother was the head of the family she named appellant with a female name. He also stated that they did not inform him because he did not believe in the Chinese religion or spirits and was a Christian, and that if he were told he would naturally refuse to carry out the antiquated customs and would insist on a celebration because it was a boy. [Tr. 81.] This certainly corroborates the reason that his mother and family in China did not advise Lew

Wah Fook of the true fact that appellant was in fact a boy and not a girl. He also testified in response to a question in cross-examination that his mother consulted a fortune teller in addition to going through the ritual at the Chinese temple. [Tr. 81-82.]

It is respectfully submitted that the Court manifested its state of mind that it was actually indulging in conjecture rather than rendering a decision from the testimony and evidence adduced and introduced at the time of the trial in its brief summary where it stated that it could not believe that if plaintiff and appellant was in fact a boy this fact had not been called to the attention of Lew Wah Fook, the alleged father. Thus it appears that the decision for the defendant-appellee was based solely on the matter of the female name given to a male child, and the Court completely disregarded the completely logical and probable explanation of Lew Wah Fook, and the positive identification and testimony of the two older brothers that they had lived in the same house with appellant and their mother from the time they could remember in the village in China where they were all born, and the three of them went to Hong Kong and then to the United States.

It might be observed that although plaintiff-appellant had the burden of proof in the suit below, this type of burden does not raise a presumption that the plaintiff or his witnesses will commit perjury.

Lee Mon Hong v. McGranery (1953), 110 Fed. Supp. 682.

The testimony above set forth of the appellant and his father clearly expresses a father and son relationship. It was stated by Judge Wilbur in the case of *Gung You v. Nagle*, 34 F. 2d 848, at page 852:

“Relationship is now usually proven by physical facts, and never is where the mother does not testify, but by pedigree, reputation in the family and by the conduct of the parties, including the manner in which they live. The fact that a small child lives in the home of its alleged parents and that they maintain toward each other the obligation involved in the relationship is evidence favorable to the issue, and evidence that they did not live together and did not conduct themselves as parent and child is evidence to the contrary. Such evidence is not collateral evidence, it is direct and material evidence on the issue.”

The testimony of the appellant and his father standing alone would be sufficient to establish a *prima facie* showing of the claimed relationship. This pedigree evidence, if uncontradicted by other evidence, is sufficient to sustain the issue it covers. Such testimony is entitled to consideration in arriving at a decision in this matter. This Court has previously stated:

“He took the stand and testified to his own belief concerning his place of birth. This evidence of course, was hearsay, but nevertheless, it is the type of hearsay which is permitted. *U. S. v. Wong Gong* (C. C. A.), 70 F. 2d 107.”

Lee Hin v. United States, 74 F. 2d 172, 173.

Also see:

Ex parte Delaney, 72 Fed. Supp. 312, affd. 170 F. 2d 239.

The same view was expressed by this Court in *United States v. Wong Gong*, 70 F. 2d 107:

“The testimony of the witness as to the date and place of his birth is, of course, hearsay, but it is competent. *Wigmore on Evidence*, p. 1501; *United States v. Tod* (C. C. A.), 296 F. 345.”

The Court of Appeals for the First Circuit stated that in the absence of official records, statements of the parents concerning their children should be considered as reliable.

O'Connell v. Ward, 126 F. 2d 615, 620.

The evidence offered by appellant to establish his claim to United States citizenship cannot be wholly disregarded without sufficient reasons.

See:

Wong Kam Chong v. United States, 111 F. 2d 707, 712;

Lau Hu Yuen v. United States (9 Cir.), 85 F. 2d 327.

It was stated by the Court of Appeals for the First Circuit in *Ward v. Flynn*, 74 F. 2d 145, at page 146:

“* * * to reject sworn, consistent, unimpeached and uncontradicted testimony, there must be a real reason which would be regarded as adequate by fair minded persons.”

As appellant contends that he is a citizen and national of the United States and Statutes of the United States in effect at the time of his birth specifically provided that the foreign born child of a United States citizen acquired citizenship at birth, once the relationship of the

appellant to the said Lew Wah Fook, his alleged father, and a recognized United States citizen, has been established by evidence of record, the appellant must be deemed to have acquired United States citizenship in accordance with the provisions of that statute. The claim to United States citizenship, having been established, the appellant is entitled to declaratory judgment of United States nationality.

Acheson v. Yee King Gee, 184 F. 2d 382;

Wong Gan Chee v. Acheson, 95 Fed. Supp. 816;

Toy Teung Kwong v. Acheson, 95 Fed. Supp. 745.

The appellant's uncontroverted, positive and affirmative evidence of record affords bare conjecture to the contrary. The appellant established the claimed relationship by a fair preponderance of the evidence.

The appellant identified himself, as did his witnesses, by direct and positive evidence as the lawful blood child of a recognized United States citizen who had resided in the United States. The lawful son of a recognized United States citizen is legally entitled to a declaratory judgment of United States citizenship. (8 U. S. C. A. 903.)

Conclusion.

It is therefore respectfully submitted that the findings of the Trial Court are "clearly erroneous" within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure in that there was not a "scintilla" of evidence to warrant the Court in finding for the defendant-appellee. In concluding that Lew Wah Fook, the guar-

dian and alleged father of appellant, should have been advised that, in fact, a son was born to him and his wife rather than a daughter, as the name indicated, the Court committed prejudicial error. As the Trial Court chose to disregard the uncontradicted and unimpeached testimony of appellant, his guardian and his two older brothers and apparently indulged in conjecture, the judgment should be reversed and appellant declared to be a national and/or citizen of the United States and a lawful blood child of Lew Wah Fook.

Dated: Los Angeles, California, January 27, 1954.

Respectfully submitted,

BRENNAN & CORNELL,

By WM. E. CORNELL,

Attorneys for Appellant.

No. 14106.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY
YET, also known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, Calif.,
Attorneys for Appellee.

FILED

MAR 24 1954

PAUL P. O'BRIEN
CLERK



TOPICAL INDEX

	PAGE
Jurisdiction	1
Statutes involved	2
Statement of the case.....	4
Summary of argument.....	6
Argument.....	7

I.

The burden is on the plaintiff to prove his American citizenship, and the plaintiff failed to sustain that burden.....	7
A. The trial court's findings are not clearly erroneous.....	16

TABLE OF AUTHORITIES CITED

CASES	PAGE
Chin Him, Ex parte, 227 Fed. 131.....	21
Fleming v. Palmer, 123 F. 2d 749.....	20
Jung Yem Loy v. Cahill, 81 F. 2d 809.....	22
Lee Fin v. United States, 218 Fed. 432.....	21
Ly Shew v. Acheson, 110 Fed. Supp. 50.....	21
Margong v. Brownell, F. 2d (Jan. 12, 1954).....	21
Mui Sam Hun v. United States, 78 F. 2d 612.....	16, 17
Quock Ting v. United States, 140 U. S. 417.....	16, 17
United States v. Oregon Medical Society, 343 U. S. 326.....	16, 17
United States v. U. S. Gypsum Co., 333 U. S. 364.....	
.....	5, 16, 17, 19, 20
Wong Choy v. Haff, 83 F. 2d 983.....	22
Wong Ying Leon v. Carr, 108 F. 2d 91.....	22

RULES

Federal Rules of Civil Procedure, Rule 52(a)	7, 18
--	-------

STATUTES

Immigration and Nationality Act of 1952, Sec. 403(a) (42).....	2
Immigration and Nationality Act of 1952, Sec. 405(a).....	2
Nationality Act of 1940, Sec. 503	1, 2
Nationality Act of 1940, Sec. 903.....	2
United States Code, Title 8, Sec. 903.....	1, 2, 4
United States Code, Title 28, Sec. 1291.....	1
United States Code, Title 28, Sec. 1294(1).....	1

No. 14106.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEW WAH FOOK, as Guardian *ad Litem* for LEW SUEY
YET, also known as LEW THEW YUT,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the
United States,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903).

Judgment for the defendant that the plaintiff is not a citizen or national of the United States and that the plaintiff's cause of action be dismissed, was docketed and entered May 14, 1953. There being no dispute that said judgment was a final order, this Court has jurisdiction under the provisions of Title 28, U. S. C., Sections 1291 and 1294(1), of this appeal.

Statutes Involved.

Plaintiff's complaint was filed and served July 10, 1952, at a time when Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) was effective. While that Act was repealed by Section 403(a)(42) of the Immigration and Nationality Act of 1952, which became effective December 31, ^{24, 1952} 1953, the savings clause in Section 405(a) of the latter Act preserves plaintiff's cause of action. Section 405(a) of the 1952 Act reads in part as follows:

"Section 405(a). Nothing contained in this Act, . . . shall be construed to effect the validity . . . or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; . . ."

Section 903 of the 1940 Act reads as follows:

"§903. *Judicial proceedings for declaration of United States nationality in event of denial of rights and privileges as national; certificate of identity pending judgment*

If any person who claims a right or privilege as a national of the United States is denied such right or privilege by any Department or agency, or executive official thereof, upon the ground that he is not a national of the United States, such person, regardless of whether he is within the United States or abroad, may institute an action against the head of such Department or agency in the District Court of

the United States for the District of Columbia or in the district court of the United States for the district in which such person claims a permanent residence for a judgment declaring him to be a national of the United States. If such person is outside the United States and shall have instituted such an action in court, he may, upon submission of a sworn application showing that the claim of nationality presented in such action is made in good faith and has a substantial basis, obtain from a diplomatic or consular officer of the United States in the foreign country in which he is residing a certificate of identity stating that his nationality status is pending before the court, and may be admitted to the United States with such certificate upon the condition that he shall be subject to deportation in case it shall be decided by the court that he is not a national of the United States. Such certificate of identity shall not be denied solely on the ground that such person has lost a status previously had or acquired as a national of the United States; and from any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing the reasons for his decision. The Secretary of State, with approval of the Attorney General, shall prescribe rules and regulations for the issuance of certificates of identity as above provided. Oct. 14, 1940, c. 876, Title I, Subchap. V, §503, 54 Stat. 1171."

Statement of the Case.

This is a case in which the plaintiff is the alleged son of a Chinese man who was admitted to the United States in 1923 by the Immigration and Naturalization Service, as the son of a native. The plaintiff was born in China, allegedly on September 9, 1935, as the third son of the alleged father, Lew Wah Fook.

When the plaintiff, the alleged number 3 son, and the number 1 and number 2 sons came to the United States, the Immigration and Naturalization Service detained them for hearings to determine whether or not they should be admitted as citizens. There is no dispute that the number 1 and number 2 sons were admitted by the Immigration Service. The plaintiff herein, however, after hearings duly held by the Immigration Service, was determined by that Service not to be a citizen of the United States and was excluded.

Before the cause of action provided in 8 U. S. C., Section 903, arose in 1940, the usual procedure would be for the plaintiff to seek a writ of habeas corpus for review of the Immigration Service Deportation or Exclusion Order, but that was never done in this case. Instead, plaintiff chose to file the present action, thereby getting a trial *de novo* in the District Court, as distinguished from a review of the Immigration Order which the Court would have given in a habeas corpus case.

Herbert Brownell, as Attorney General of the United States, being the "head of the Department" which denied

plaintiff the right or privilege of a citizen, to wit, the right to be admitted to the United States, on the ground that plaintiff was not a citizen, the Attorney General is the proper party defendant in the action.

The District Court, after hearing the testimony of the plaintiff, his alleged father, and his two alleged brothers, gave judgment for the defendant, that the plaintiff was not the person he claimed, was not a United States national, and dismissed plaintiff's cause of action.

The question raised by appellant on appeal is whether or not the decision of the District Court, the trier of the facts, is "clearly erroneous." Appellant relies on the language of *United States v. U. S. Gypsum Co.* (1948), 333 U. S. 364, in which the Court says:

"A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

Appellee believes the real question in the case is whether or not the plaintiff has sustained the burden of convincing the Court that he is the person he claims to be. A reading of the entire record gives rise to *no* firm conviction regarding the question of whether the plaintiff is, or is not, the son of the alleged father, Lew Wah Fook. In fact, after reading the entire record, there is anything but a firm conviction that the plaintiff is the person he claims to be.

Reduced to its simplest terms, the question might be stated thus: Has the plaintiff sustained his burden of proving his American citizenship, if the plaintiff and his father take the witness stand, and in a few short statements say "this is my son" and "this is my father"? Is a person, born in China, who has lived there all his life, entitled to receive a decree of the District Court that he is a citizen on such evidence? Clearly there is little to convince the mind of the Court under such circumstances. What then is the plaintiff's burden? If the Court is not convinced, and a reading of the entire record leaves the mind in a state of doubt, can it be said that the decision of the District Court should be reversed?

Summary of Argument.

I.

THE BURDEN IS ON THE PLAINTIFF TO PROVE HIS AMERICAN CITIZENSHIP AND THE PLAINTIFF FAILED TO SUSTAIN THAT BURDEN.

A. THE TRIAL COURT'S FINDINGS ARE NOT CLEARLY ERRONEOUS.

ARGUMENT.

I.

The Burden Is on the Plaintiff to Prove His American Citizenship, and the Plaintiff Failed to Sustain That Burden.

Many cases are cited in appellant's brief but all are cited to support one argument, which may be summed up in the words of appellant's brief [Tr. 15]:

“here the evidence submitted by appellants to establish their citizenship is positive, uncontradicted and unimpeached. The alleged father and his two admitted sons gave testimony directly upon the issue. No contradictory or countervailing evidence has been submitted. We submit that under the well-settled principles mentioned above the findings of the court below adverse to the claim of appellant is ‘clearly erroneous’ within the meaning of 52(a) of the Federal Rules of Civil Procedure.”

The pertinent provision of Rule 52(a) upon which appellants rely provides:

“Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.”

Let us see what facts were presented to the trial court by the plaintiff, as revealed by the record, and it may become clear why the trial court did not believe that plaintiff was the son of Lew Wah Fook.

The story is similar to many another Chinese story. The alleged father, Lew Wah Fook, was born in China,

entered the United States as the son of an American citizen, made two trips back to China before the war, and each time upon returning to the United States filled out a statement for the Immigration and Naturalization Service, reporting family facts, including the births of children. The chronology is as follows:

- | | |
|-------------------|---|
| January 18, 1913 | Lew Wah Fook, alleged father, born in Canton, China. |
| July 1923 | Lew Wah Fook entered the United States as son of American citizen. |
| August 1929 | Lew Wah Fook goes back to China, first time. |
| November 9, 1930 | Lew Mon Soong, number 1 son, born (number 1 son admitted to U. S.) |
| April 15, 1931 | Lew Wah Fook returns to U. S. |
| November 1932 | Lew Wah Fook goes back to China, second time. |
| December 2, 1933 | Lew Mon Hing, number 2 son, born (number 2 son admitted to U. S.) |
| May 1935 | Lew Wah Fook returns to U. S. |
| September 9, 1935 | Lew Suey Yut, sometimes spelled Leu Siu Ngoot, plaintiff in the action, alleged number 3 son, born. |
| December 17, 1946 | Lew Mon Tang, alleged number 4 son, born in China (still in China). |

Plaintiff's Exhibit 1 in evidence is Lew Wah Fook's statement on April 15, 1931, to the Immigration Service

on his return from his first trip to China, at which time he reported the birth of the number 1 son. Plaintiff's Exhibit 2, dated July 31, 1935, is Lew Wah Fook's statement to the Immigration Service on his return from his second trip to China, at which time he reported the birth of the second son.

The plaintiff herein, the alleged third son, was born in September, 1935, some four months after Lew Wah Fook returned to the United States. The next evidence we have with regard to the plaintiff is Lew Wah Fook's statement to the Immigration Service, referred to as Government's Exhibit A in evidence, on or about April 21, 1943. This was 8 or 9 years after the plaintiff was allegedly born, and what does Lew Wah Fook report to the Immigration Service at this time? The Transcript of Record [Tr. 71] shows that in 1943, on Government's Exhibit A, he stated regarding a third child, that the name was "Lew Siu Ngoot, sex female, age 9." Nine years after the birth of the third child, allegedly the plaintiff herein, the alleged father is reporting that *that* child was a female.

The next chronological event [Tr. 71] appears to be the questioning of Lew Wah Fook in 1951 [Govt. Ex. B in evidence, pp. 19, 20, 24-26], when the number 1, 2 and 3 sons applied for admission to the United States, at which time Lew Wah Fook told the Immigration Service that he didn't have any daughters, and when they asked him about his statement in 1943 [Govt. Ex. A] he said he didn't remember that application. It also appears from the Transcript [Tr. 71] that in 1951 Lew Wah Fook told the Immigration Service that he "never claimed" any daughters, but when shown the 1943 statement [Govt.

Ex. A] he then remembered he had listed the third child as "female."

At this stage of the evidence, a reasonable person was clearly entitled to believe that the plaintiff, the alleged third son, was not the child of Lew Wah Fook, but was some boy substituted for the third child which had been a girl.

What, if any, explanation was given regarding this testimony, and what other evidence on behalf of the plaintiff, if any, was given to corroborate the bare statements that the plaintiff is the son of Lew Wah Fook?

The record is barren of any other corroborating evidence. In fact, the record on behalf of the plaintiff is the barest minimum, and amounts to very little more than Lew Wah Fook's statement that "this is my son," and the plaintiff's statement (plaintiff's direct evidence [Tr. 60] was one page and a half long); that his father is Lew Wah Fook, and he was born September 9, 1935, and lived with the two brothers, the number 1 and 2 sons. Other than that the plaintiff answered yes to a few leading questions and that is all the evidence he brought before the District Court, and he asked the District Court to find upon that slim record, that he is an American citizen.

The father's explanation of the 1943 statement to the Immigration Service is at pages 20, 24 to 26 of Exhibit B. The explanation had to be a good one, and it is interesting to note that in court, it is placed in the field of Chinese custom where it is difficult to dispute.

Lew Wah Fook's explanation is as follows [Tr. 72-77]:

"Q. (By Mr. Talan, for the Government): Referring to page 42 of Exhibit 1 attached to Defen-

dant's Exhibit B for identification, I ask you whether or not you gave the following answer to this question: 'On this form under "Describe all your children," it says two sons and one daughter, and it gives the third child, Lew Siu Ngoot, born CR 24-12- as female. How do you explain that?

A. I don't know how that come in, I couldn't explain to you. I never was claiming a daughter, I never had one before.'

Q. Did you make that answer?

A. I did make that statement. However, I want to explain that when I said I never claimed a daughter, I did claim a daughter, but I never claimed a daughter to the immigration office, that is what I meant.

The Court: You say you claim a daughter? What daughter do you claim? [68]

The Witness: I thought Lew Thew Yet was a daughter.

The Court: This is the party you were referring to?

The Witness: Yes. I thought he was a girl.

The Court: You mean to say that when this boy was born or when the child was born, you thought a girl was born, is that right?

The Witness: Yes, that's right.

The Court: When did you find out it wasn't a girl?

The Witness: When I was in the Army and I had my leave and went back to the village, I found out it was a boy.

The Court: That is the first time you found out this is a boy?

The Witness: That is my first time.

The Court: Who names Chinese children?

The Witness: The head of the family. In my case, it was my mother.

The Court: Didn't your mother or your wife ever write you after the birth of this child what the name of the child was?

The Witness: I received correspondence saying that my wife gave birth to a child and gave me the name and date of birth, and it was born and it was well, but I just assumed, it was a girl's name, I just assumed it was a daughter. It didn't mention specifically whether it was a boy or a girl, but it was a girl's name, so I deduced it was a girl. [69]

The Court: Don't you think it very strange a girl's name was given to a boy?

The Witness: This was an unusual case, yes.

The Court: May I ask the interpreter a question?

The Interpreter: Yes.

The Court: Have you ever heard in China where a girl's name was given to a boy?

The Interpreter: Yes, it has happened before. There is some sort of superstition. In fact, when I was a child, I had to have my Chinese name changed once because when I was a child I was very sickly and they felt the name had something to do with it, and it didn't suit my nature.

The Court: They didn't give you a girl's name?

The Interpreter: My second name could be interpreted that way.

The Court: There is no question this is a girl's name?

The Interpreter: Mine is questionable, but this is strictly a girl's name. The second name means pretty and a boy would never be called pretty. A girl's

name flows into three or four situations, where they are after something, pretty or esthetic or after a flower or after something that is very delicate. A boy's name would be something strong, something ferocious, like some sort of an animal or something [70] hard, like rock or steel. Chiang Kai Shek's name is rock.

The Court: It would seem to me mighty strange, considering the attitude of the Chinese relative to the difference between a boy and a girl, the male and the female, that they are always celebrating the birth of a boy. I don't know what they do with the girls. The girls in the Chinese race would be exterminated in three or four generations if the ratio we have in these cases applies. We don't have any girls at all.

The Interpreter: There is a time when you do have a girl and they don't mention it. The son they are very proud of. It is some sort of primogeniture.

The Court: It would take a lot of explanation as to why this was done, considering the fact that in China the sons are always the ones that are wanted, they are the ones that carry on the race, so it would take a lot of explanation as to why anybody would name a boy as a girl. It is pretty near inconceivable.

The Interpreter: It is very unusual.

The Court: Ask the witness this: You claim you didn't know this child was a boy until you went back to the village when you were in the Army in 1946 or 1947.

Mr. Brennan: 1946.

The Court: Yes, 1946.

The Witness: It was in 1946 that I first found out it was a boy instead of a girl. Naturally, I was very joyous of [71] the fact and I demanded an ex-

planation. The explanation was that my mother, who was a highly superstitious woman, at the time when the child was born, she went to this idol that they have and through this process of the idol, they shook these little bamboo sticks that have characters in them, and in that way she can get the name for the boy. The name came out from the bamboo sticks stating that it is a girl's name, the child would not live long, so it must be a girl. So subsequently when the child was born and they found out it was a boy, my mother sought to offset the spirits by giving the boy a girl's name, and instructed all the rest of the family not to tell me it was a boy, but to inform me, if they ever had the chance to write to me, to either keep quiet about it or tell me it was a girl.

The Court: When did you get this information? When did you find out this information?

The Witness: When I went back to China in 1946 and I saw my child, and by his features I knew it was a boy. I demanded an explanation. It was at that time that they told me what went on. Right away I was denied of a joyous celebration because it was a boy, and at that very moment when I found out, I wanted to make a ceremony and change the name to a boy's name, but my mother would not let me do so, stating the boy would have to reach the age of 18 before such a process [72] can be undertaken; otherwise, his health would be in jeopardy."

In answer to further questions by the government [T. R. 78-79] the alleged father stated that he claimed "one wife, two sons and one daughter" in his claim of dependents while he was in the Armed Forces, and made the same claim in income tax returns prior to 1943.

Further [T. R. 80-82], the father gave a fantastic explanation as to what was said to him when he first allegedly saw the third child was a boy when he had a furlow to China in 1946. The explanation was as follows:

“Q. (By Mr. Talan, for the government) What is the explanation that was given to you at that time for the fact that the third boy in that house bore the name that was given to him?

A. Prior to the actual birth, my wife was expecting any day, and my mother went to this temple and shook these bamboo sticks. The sticks that fell from this disclosed that I was not due to have a son during that year, and that if I do have, give birth to a son, that is my wife give birth to a son, that person will not live. So in order to offset that, in the event you do have a son, you have to give it a girl's name and you have to train it as if it was a girl until it is 18 years old, and at that time you can change the name and treat it as a boy from there on, but before that you have to treat it as a girl. [77]

Q. Prior to your return to the village in 1946, you never received such an explanation in your correspondence with your family in China?

A. They never informed me, because I don't believe in the Chinese religion or spirits. I am a Christian. I assume if they told me, I would naturally refuse to carry out such antiquated custom. I would make sure there would be a celebration because it was a boy. Also, I would give it a boy's name if I had known about it.

Q. Did anybody in your family consult a fortune teller with respect to the naming of this child?

A. Yes. There was a fortune teller that my mother consulted after she went through this procedure at the

temple, and the fortune teller also told her the same thing, that if it was a son, it would not live long, that we have to give it a girl's name and raise it as if it is a girl."

A. The Trial Court's Findings Are Not Clearly Erroneous.

In view of the above testimony, which the District Court was entitled to disbelieve, and the interpreter's statements [T. R. 75-76], how can it be said that the findings of the District Court, based on the documentary evidence, were "clearly erroneous"?

Many of the cases cited in appellant's brief are cases where the findings of the District Court were set aside because there was written or documentary evidence contrary to the findings of the court, and the oral testimony was conflicting. In this case the documentary evidence [Gov. Ex. A] supports the court's decision. In order to set aside the finding this Court will have to believe that the fantastic explanation given by the father was true and will have to find it was error for the District Court *not* to believe the father's testimony, and that on the entire evidence this Court has a firm conviction that a mistake has been committed. The weight of the plaintiff's case is not sufficient, and the testimony by interested parties too brief for anyone reading the entire record to be left with any definite conviction that the District Court came to the wrong conclusion.

The following cases are of assistance on this problem:

Quock Ting v. United States (1891), 140 U. S. 417;

Mui Sam Hun v. United States, 78 F. 2d 612;

United States v. Gypsum, 333 U. S. 364;

United States v. Oregon Medical Society, 343 U. S. 326.

In the *Quock Ting* case, Justice Field said at page 420:

“There may be such an inherent improbability in the statements of a witness as to induce the Court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; . . .”

In the *Mui Sam Hun* case, in an appeal from an order denying a petition for a writ of habeas corpus, where the immigration record was reviewed, the Court said at page 615:

“The rule is not, as appellant contends, that the applicant need only to make out his case by a fair preponderance of the evidence, for it is not incumbent upon the government to offer any evidence whatsoever. Rather, the burden is upon the applicant to prove his right to admission and the board is the sole judge of credibility of the witnesses, and its finding will not be disturbed without a showing that the hearing was unfair and unreasonable, or that the finding was arbitrary or capricious. The weight of the evidence and the credibility of witnesses is not for us, but for the board.”

The opinion of Justice Jackson in the *Oregon Medical Society* case (*supra*) was written in 1952 and quotes the language in the case of *United States v. Gypsum* (*supra*). In the *Medical Society* case the District Court dismissed the government's complaint under the Sherman Act, after a long trial, on the ground the Government had proven none of its charges by a “preponderance of the evidence.” The trial judge found that no conspiracy to restrain or monopolize medical cases among other findings, and the government asked the Court of Appeals to over-

rule the findings as contrary to the evidence. The Court of Appeals affirmed the District Court's judgment of dismissal and said at page 332:

"We are asked to review the facts and reverse and remand the case 'for entry of a decree granting appropriate relief.' We are asked in substance to try the case *de novo* on the record, make findings and determine the nature and form of relief. We have heretofore declined to give such scope to our review. *United States v. Yellow Cab Company*, 338 U. S. 338."

The opinion then refers to Rule 52(a) of the Federal Rules of Civil Procedure and concludes at page 339:

"We conclude that the Government has not clearly proved its charges. Certainly the court's findings are not clearly erroneous. 'A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' *United States v. United States Gypsum Co.*, 333 U. S. 364, 395. The Government's contentions have been plausibly and earnestly argued but the record does not leave us with any 'definite and firm conviction that a mistake has been committed.'

"As was aptly stated by the New York Court of Appeals, although in a case of a rather different substantive nature: 'Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . How can we say the judge is wrong? We never saw the witnesses . . .

To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' *Boyd v. Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634."

In the *Gypsum* case (*supra*) the District Court granted a motion to dismiss after presentation of the Government's case in a suit by the United States to restrain alleged violations of the Sherman Act. The Court made many findings, and regarding Finding 118, the trial court found that the evidence "fails to establish that defendants associated themselves in a plan to blanket the industry under patent licenses and stabilized prices." After discussing the evidence on the question of conspiracy, the Court says at page 399:

"The government relied very largely on documentary exhibits, and called as witnesses many of the authors of the documents. Both on direct and cross-examination counsel were permitted to phrase their questions in extremely leading form, so that the import of the witnesses' testimony was conflicting. On cross-examination most of the witnesses denied that they had acted in concert in securing patent licenses or that they had agreed to do the things which in fact were done. Where such testimony is in conflict with contemporaneous documents we can give it little weight, particularly when the crucial issues involve mixed questions of law and fact. Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous."

The Court also said at page 395:

"The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial

court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The *Gypsum* case and *Fleming v. Palmer*, 123 F. 2d 749, cited by appellants, announces propositions which are of value as guides only when applied to the facts of a particular case. In the *Fleming* case the District Court found that the business was controlled by the Palmers and not by the workers. The Court of Appeals, after reviewing the evidence which was largely documentary, for ten or eleven pages of its opinion, concludes:

"A thorough study of the record has disclosed that Palmer possessed extraordinary powers. Whatever powers he might possibly have lacked were lodged in the group of employees most naturally inclined to be favorable to him. The history of the formation and operation of the cooperative, the Articles of Incorporation and the By-Laws do not reveal an industrial democracy governed by the workers. We have been forced to conclude that the district judge's finding that the workers and not the Palmers controlled the business and this cooperative is against the clear weight of the testimony and must be set aside."

That is a far different case than the present one. It would appear that the Court of Appeals lends greater credibility to documentary evidence as distinguished from oral testimony.

With regard to the cases cited by appellant on the question of discrepancy testimony, the recent opinion of this Court (January 12, 1954) in the case of *Margong v. Brownell*, F. 2d, is in point. This Court said:

“This Court has had occasion recently to uphold the findings made by the trier of facts which refused to credit a witness’ testimony even although that testimony is not contradicted. *National Labor Relations Board v. Howell Chevrolet Company*, 204 F. 2d 79, 86 (Affirmed *Howell Chevrolet Co. v. National Labor Relations Board*, U. S., Dec. 14, 1953) (citing other cases in a footnote). Upon the plaintiff’s own theory all of the witnesses who testified on his behalf are interested and when viewed in this light their mere say-so does not have to be accepted. (Citing cases.)”

Judge Goodman in the case of *Ly Shew v. Acheson*, 110 Fed. Supp. 50, at 58, states that the rule is that the proof of alleged citizenship must be “clear and convincing.” Other cases to this effect are *Lee Fin v. United States* (C. C. A. 2), 218 Fed. 432; *Ex parte Chin Him*, 227 Fed. 131.

The enunciation of rules of proof appears to be of little help. The decision as to whether the plaintiff has sustained his burden to “convince” the Court, is directed to the “conscience” of the Court, and where as in this case, a reading of the full transcript leaves the Court in grave doubt as to whether or not the plaintiff is a citizen, and when, in good conscience the Court cannot make a finding that the plaintiff *is* a citizen, in view of the record, the finding and decision of the District Court that plaintiff *is not* a citizen, should not be set aside.

That the burden is on the appellants to prove their alleged United States nationality has been the view of this Court in the following cases:

Jung Yem Loy v. Cahill, 81 F. 2d 809;

Wong Choy v. Haff, 83 F. 2d 983;

Wong Ying Leon v. Carr, 108 F. 2d 91.

It is respectfully submitted that the decision and the findings of the District Court should be affirmed.

LAUGHLIN E. WATERS,
United States Attorney,

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 14107.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WEAVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
*Asst. United States Attorney,
Chief of Criminal Division,*

MANUEL L. REAL,
*Asst. United States Attorney,
600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.*

FILED

FEB 4 1954



TOPICAL INDEX

	PAGE
I.	
Statement of jurisdiction.....	1
II.	
Statutes involved	2
III.	
Statement of the case.....	3
IV.	
Statement of facts.....	4
V.	
Argument.....	6
A. The trial judge properly allowed the Government to ask foundation questions for the impeachment of its own witness	6
B. The court properly admitted the diary of Penfield as part of the impeachment of her testimony.....	9
C. The court properly admitted documents written by Pen- field and statements made to agents of the Federal Bureau of Investigation as impeachment of her testi- mony	9
D. There was no error in the inquiry into the truthfulness of statements that Penfield made prior to trial to test her veracity as a witness.....	10
E. The evidence is sufficient to sustain a judgment of con- viction	10
VI.	
Conclusion	11

TABLE OF AUTHORITIES CITED

CASES	PAGE
Pastrano v. United States, 127 F. 2d 43.....	7
Schonfeld v. United States, 277 Fed. 934.....	7
St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 S. Ct. 1002.....	7
United States v. Block, 88 F. 2d 618.....	7
United States v. Budd, 144 U. S. 154.....	7
United States v. Graham, 102 F. 2d 436.....	7
Walker v. United States, 104 F. 2d 465.....	7
Young v. United States, 97 F. 2d 200.....	7

STATUTES

United States Code, Title 8, Sec. 1291.....	2
United States Code, Title 18, Sec. 2421	1, 2
United States Code, Title 18, Sec. 3231.....	2

No. 14107.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRANK WEAVER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLEE.

I.

STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California on July 29, 1953, under Section 2421 of Title 18, United States Code.

On August 17, 1953, the appellant was arraigned, entered a plea of not guilty, and the case was set for trial on September 8, 1953.

On September 8, 1953, appellant was tried in the United States District Court for the Southern District of California before the Honorable Peirson M. Hall, sitting without a jury, and on September 9, 1953 was found guilty as charged in the Indictment.

On September 14, 1953, appellant was sentenced to pay a fine in the sum of \$5,000.00 and imprisonment for a

period of five years, and judgment was so entered. Appellant appeals from this judgment.

The District Court has jurisdiction of this cause of action under Section 2421 of Title 18, United States Code, and Section 3231 of Title 18, United States Code.

This Court has jurisdiction of the appeal under Section 1291 of Title 8, United States Code.

II.

STATUTES INVOLVED.

The Indictment in this case was brought under Section 2421 of Title 18, United States Code.

The Indictment charges a violation of Section 2421 of Title 18, United States Code, which provides in pertinent part:

“Whoever knowingly transports in interstate or foreign commerce, . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose, or with the intent and purpose to induce, entice, or compel such woman or girl to become a prostitute or to give herself up to debauchery or to engage in any other immoral practice; or

“Whoever knowingly procures or obtains any ticket or tickets, or any other form of transportation or evidence of the right thereto, to be used by any woman or girl in interstate or foreign commerce, . . . in going to any place for the purpose of prostitution or debauchery, or for any other immoral purpose, . . . whereby any such woman or girl shall be transported in interstate or foreign commerce, . . .

“Shall be fined not more than \$5,000, or imprisoned not more than five years, or both.”

III.

STATEMENT OF THE CASE.

The Indictment charges as follows:

“On or about December 15, 1952, defendant FRANK WEAVER did knowingly transport and cause to be transported, and did aid and assist in obtaining transportation for, and in transporting, a woman, namely: Dolores June Penfield, in interstate commerce, namely: from Minneapolis, Minnesota to Los Angeles County, California, within the Central Division of the Southern District of California, for prostitution, debauchery, and other immoral purposes.”

On August 17, 1953, the appellant appeared for arraignment and plea, represented by Earl C. Broady, Esq., before the Honorable Peirson M. Hall, United States District Judge, and entered a plea of not guilty to the offense charged in the Indictment. On September 8, 1953, the case was called for trial before the Honorable Peirson M. Hall, United States District Judge, sitting without a jury, and on September 9, 1953, appellant was found guilty as charged in the Indictment.

On September 14, 1953, the appellant was sentenced to pay a fine in the sum of \$5,000.00 and be imprisoned for a period of five years in a penitentiary.

Appellant assigns as error the judgment of conviction on the following grounds:

A—The Court erred in permitting the impeachment of the Government's witness, in the absence of a foundation showing surprise, and the Court erred in holding that there was surprise.

B—The Court erred in admitting the hearsay diary of the prosecutrix into evidence “for the limited purpose of testing the verity of this witness.”

C—The Court erred in permitting the reading by the prosecutor of documents purportedly written by the prosecutrix and permitting the reading of extrajudicial statements of the prosecutrix allegedly made to agents of the Federal Bureau of Investigation.

D—The Court erred in inquiring into the truthfulness of hearsay statements which were admitted by the Court to “test the verity of the witness” and for impeachment purposes only.

E—The evidence is insufficient to sustain the judgment of conviction in that two necessary elements, to wit: transportation and intent and purpose, as required by statute, were not proved.

F—The Court erred in denying defendant’s Motion for Judgment of Acquittal.

IV.

STATEMENT OF FACTS.

Dolores June Penfield met the appellant, Frank Weaver, in 1949. Shortly thereafter she went to work for Weaver in his malt shop. She also went to live with Weaver and they assumed a meretricious relationship. Penfield, during this time, was also known as Lola Weaver.

During the time Penfield was living with Weaver, she engaged in activities of prostitution in Los Angeles. She gave money to Weaver. [Tr. pp. 17-18.]¹ Weaver on occasion posted bond for Penfield in arrests for prostitution. [Tr. p. 19.]

¹“Tr.” refers to “Reporter’s Transcript of Proceedings.”

During October, 1952, Penfield, after a misunderstanding with Weaver, left Los Angeles in company of one Jerry Frazier and one Harry Seymour. [Tr. pp. 49, 72.] Penfield, Frazier and Seymour went to Minneapolis, Minnesota. Frazier and Seymour were subsequently tried in Minneapolis for transporting Penfield in interstate commerce for the purpose of prostitution. [Tr. pp. 134, 148.] Penfield was interviewed by agents of the Federal Bureau of Investigation in Minneapolis, Minnesota. [Tr. p. 131.]

While in Minneapolis, Penfield received a telephone call from Weaver asking her to return to Los Angeles to work for him. [Tr. pp. 90-92.] Subsequently, Weaver went to Minneapolis and he and Penfield resided there together until their return together to Los Angeles. [Tr. pp. 95-96.]

During Weaver's stay in Minneapolis, he resided at the Frederick Hotel. [Tr. pp. 95-96.] He had several conversations concerning prostitution activities in Los Angeles and his participation therein. [Tr. pp. 97-98, 108, 110-113.]

After Weaver's and Penfield's return from Minneapolis to Los Angeles, Penfield again engaged in prostitution activities in Los Angeles. [Tr. pp. 115-120, 124-125.]

On May 25, 1953, Penfield was, at her own instigation, interviewed by Agents of the Federal Bureau of Investigation in connection with information concerning a possible violation of the White Slave Traffic Act. [Tr. pp. 234, 256.] Again, on July 29, 1953, Penfield was interviewed by Agents of the Federal Bureau of Investigation. Each time she made substantially the same statements

regarding her transportation from Minneapolis, Minnesota, to Los Angeles, California, by Weaver.

On July 31, 1953, Weaver was arrested by Agents of the Federal Bureau of Investigation. Penfield was with Weaver at the time of his arrest.

V.

ARGUMENT.

A. The Trial Judge Properly Allowed the Government to Ask Foundation Questions for the Impeachment of Its Own Witness.

The questions raised upon the appeal of the present case are threefold. They resolve themselves from a situation where the Government, discerning the recalcitrance of a witness, seeks to go forward with the impeachment of that witness after a claim of "surprise" or at least an ascertainment by the Court that the Government did not reasonably anticipate the recalcitrance of the witness. The questions are (1) whether the Court properly permitted cross-examination of the witness, (2) whether prior inconsistent or contradictory statements by a hostile witness were properly admitted, and (3) whether such prior statements were properly limited to the question of the credibility of the witness or were in fact used as a device to present otherwise inadmissible evidence. It should be noted from the outset that once the hostility of a witness has become apparent, his credibility may be attacked by the calling party either through (1) cross-examination, (2) introduction of prior inconsistent or contradictory statements, or (3) through the testimony of other witnesses.

The decided cases prescribe no uniform procedure for dealing with hostile witnesses. In any case, the discretion of the trial court controls if not patently abused.

St. Clair v. United States, 154 U. S. 134, 38 L. Ed. 936, 14 S. Ct. 1002;

Young v. United States, 97 F. 2d 200.

That a calling party may impeach his own witness by cross-examination in the event of unexpected hostility is well settled.

United States v. Budd, 144 U. S. 154.

The extent of cross-examination of a witness whose hostility appears toward the calling party rests within the discretion of the Court but must be limited solely to his credibility on the stand rather than to encompass otherwise inadmissible evidence damaging to the opposing party which may have been contained in any prior statements made by such hostile witness. *Young v. United States*, *supra*; *United States v. Block*, 88 F. 2d 618. Compare: *Pastrano v. United States*, 127 F. 2d 43; *Schonfeld v. United States*, 277 Fed. 934; *United States v. Graham*, 102 F. 2d 436, where detailed expositions appear of the extent of cross-examination permitted by the trial court and sanctioned by appellate courts.

The language contained in *Walker v. United States*, 104 F. 2d 465, well states the rationale of the rules relating to examination of hostile witnesses as follows:

“The appellants also objected that the government was allowed to impeach certain of its witnesses by cross-examining them with respect to certain written statements contrary to their testimony which they had made before trial. The rule to be applied in dealing with a recalcitrant witness is thus stated in

DiCarlo v. United States, 2 Cir., 6 F. 2d 364, 368: 'The latitude to be allowed in the examination of a witness, who has been called and proves recalcitrant, is wholly within the discretion of the trial judge. *Nothing is more unfair than to confine a party under such circumstances to neutral questions.* Not only may the questions extend to cross-examination, but, if necessary to bring the truth, it is entirely proper to inquire of such a witness whether he has not made contradictory statements at other times. He is present before the jury, and they may gather the truth from his whole conduct and bearing, even if it be in respect of contradictory answers he may have made at other times.' See, also, Big Vein Pocahontas Co. v. Repass, 4 Cir., 238 F. 332; Curtis v. United States, 10 Cir., 67 F. 2d 943, 946; London Guaranty & Accident Co. v. Woelfle, 8 Cir., 83 F. 2d 325." (Emphasis ours.)

In the present case, the trial judge heard the testimony. He observed the manner in which Penfield, the Government witness, testified. He was aware of the recalcitrance of Penfield as a Government witness. This becomes obvious from the record. At one time early in Penfield's testimony, it was necessary for the Court to admonish her severely. [Tr. pp. 15-16.] Therefore, it is submitted that the Court properly allowed the Government to ask impeaching questions of its own witness by cross-examination.

B. The Court Properly Admitted the Diary of Penfield as Part of the Impeachment of Her Testimony.

The only question raised here is whether or not a diary kept by Penfield could be used as impeachment of her testimony.

Penfield had told Agents of the Federal Bureau of Investigation that the entries in the diary were true and that they were an account of her relationship with the appellant Weaver. In her testimony at the trial, she denied the truth of those statements and characterized them as a "figment of my imagination." Certainly then her testimony on the stand was inconsistent and contrary to her prior statements given to Agents of the Federal Bureau of Investigation. It is submitted that the diary was properly admitted and limited to impeachment of Penfield's testimony.

C. The Court Properly Admitted Documents Written by Penfield and Statements Made to Agents of the Federal Bureau of Investigation as Impeachment of Her Testimony.

No new question is raised by appellant's Specification of Error in regard to documents written by Penfield and statements made to the Federal Bureau of Investigation. It is therefore respectfully requested that the argument heretofore made under paragraphs A and B of this Argument be made applicable also to this Specification of Error.

D. There Was No Error in the Inquiry Into the Truthfulness of Statements That Penfield Made Prior to Trial to Test Her Veracity as a witness.

The Court properly inquired into the truthfulness of statements made by Penfield to Agents of the Federal Bureau of Investigation. By this method of questioning, the witness was given an opportunity to refresh her recollection and to correct her testimony if she were innocently mistaken. The trial judge limited very strictly all of the questions concerning the inconsistency of Penfield's testimony with her prior statements to impeachment only, and it is therefore submitted that the Court did not err in inquiring into the truthfulness of these statements.

E. The Evidence Is Sufficient to Sustain a Judgment of Conviction.

A reading of the Record, especially the testimony of the Government's witnesses, viz.: Margaret B. Smith [Tr. pp. 88-92], Arnold Roston [Tr. pp. 93-99], James Backstrom [Tr. pp. 99-106], Margaret K. Bryant [Tr. pp. 106-113], John Allen Olsen [Tr. pp. 113-122], Robert D. Long [Tr. pp. 122-128], and William George Singer [Tr. pp. 157-161], establishes sufficiently the necessary elements of transportation, intent and purpose.

VI.

CONCLUSION.

The trial court properly allowed the impeachment of the Government's own witness.

The evidence is sufficient to sustain the judgment of conviction.

There was no error in the denial of defendant's Motion for Judgment of Acquittal.

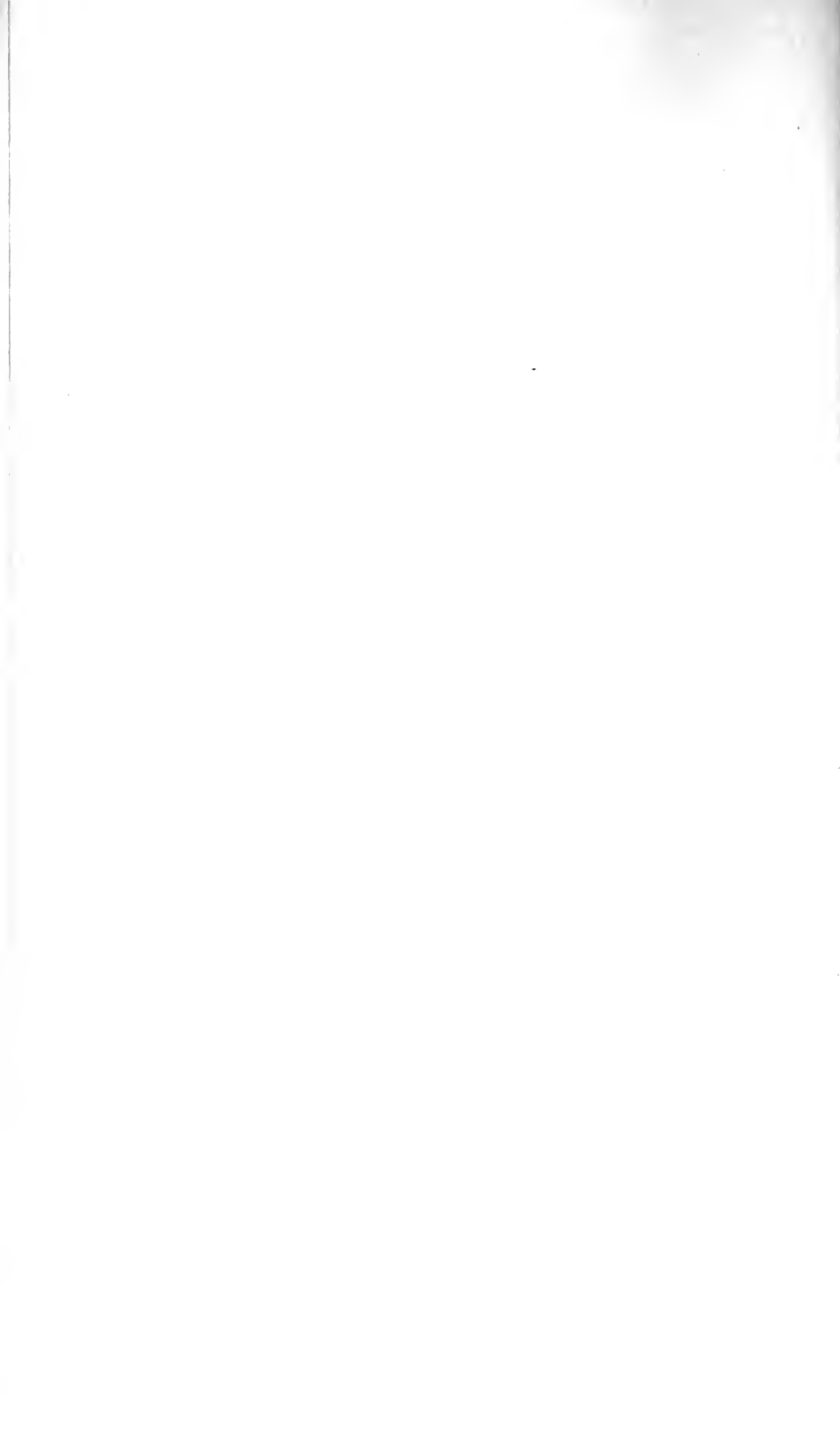
It is therefore respectfully submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

MANLEY J. BOWLER,
*Asst. United States Attorney,
Chief of Criminal Division,*

MANUEL L. REAL,
*Asst. United States Attorney,
Attorneys for Appellee.*



No. 14,252

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LENG MAY MA,

Appellant,

vs.

BRUCE G. BARBER, District Director
Immigration and Naturalization
Service, San Francisco District,

Appellee.

BRIEF FOR APPELLANT.

JACKSON & HERTOGS,

580 Washington Street, San Francisco 11, California,

Attorneys for Appellant.

FILED

NOV - 7 1966

PAUL B. O'BRIEN, CLERK



Subject Index

	Page
Jurisdictional statement	1
Statute involved	2
Statement of the case	2
Summary of issues and legal argument	4
Argument	4
Conclusion	15

Table of Authorities Cited

Cases	Pages
Bilokumsky v. Tod, 263 U.S. 149, 68 L. Ed. 221, 44 S. Ct. 54	4
Bridges v. Wixon, 326 U.S. 135, 89 L. Ed. 2103, 65 S. Ct. 1443	5
Carlson v. Landon, 342 U.S. 524, 96 L. Ed. 547, 72 S. Ct. 525	5, 13
Carmichael v. Delaney, 170 F. 2d 239	13
Fong Haw Tan v. Phelan, 333 U.S. 6, 92 L. Ed. 433, 68 S. Ct. 374	5, 9
Gegiw v. Uhl, 239 U.S. 3, 60 L. Ed. 114, 36 S. Ct. 2	5
Heikkila v. Barber, 345 U.S. 229, 97 L. Ed. 972, 73 S. Ct. 972	4
House v. Mayo, 324 U.S. 42, 89 L. Ed. 739, 65 S. Ct. 517 ..	6
Japanese Immigrant Case, 189 U.S. 86, 47 L. Ed. 721, 23 S. Ct. 611	4
Jew Sing v. Barber, 215 F. 2d 906	14
Jew Sing v. Barber, 348 U.S. 910	14
Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624	13
Kessler v. Strecker, 307 U.S. 22, 83 L. Ed. 1082, 59 S. Ct. 694	5
Knauff v. McGrath, 181 F. 2d 839	8
Kwock Jan Fat, 253 U.S. 464, 64 L. Ed. 1010, 40 S. Ct. 566	5
Kwong Hai Chew v. Colding, 344 U.S. 590, 97 L. Ed. 576, 73 S. Ct. 472	5
Lim Fong v. Brownell, 215 F. 2d 683	14
Low Wah Suey v. Backus, 225 U.S. 460, 56 L. Ed. 1165, 32 S. Ct. 734	5
McGrath v. Kristensen, 340 U.S. 162, 95 L. Ed. 173, 71 S. Ct. 224	5

TABLE OF AUTHORITIES CITED

iii

	Pages
Ng Fung Ho v. White, 259 U.S. 276, 66 L. Ed. 938	9
Ng Lin Chong v. McGrath and Wong Lai King v. McGrath, 202 F. 2d 316	6, 7
Stack v. Boyle, 342 U.S. 1, 96 L. Ed. 317	13
Tang Tung v. Edsell, 223 U.S. 673, 56 L. Ed. 606, 32 S. Ct. 569	13
United States v. Shaughnessy, 185 F. 2d 347	7
United States v. Shaughnessy, 187 F. 2d 137 aff'd sub nom Harisiades v. Shaughnessy, 342 U.S. 580	7
United States v. Shaughnessy, 234 F. 2d 715	15
United States v. Sing Tuck, 194 U.S. 161, 48 L. Ed. 917, 24 S. Ct. 621	4
Vajtauer v. Commissioner of Immigration, 273 U.S. 103, 71 L. Ed. 560, 47 S. Ct. 302	5
Wong Yang Sung v. McGrath, 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445	5, 9
Yaris v. Esperdy, 202 F. 2d 109	5
Yonijuro Makasuji v. Seager, 73 F. 2d 37	8

Statutes

8 C.F.R. 243.3(h)	6
Immigration Act of 1917:	
Section 17 (8 USCA 153)	7, 8
Section 18 (8 USCA 154)	6, 7
Section 20 (8 USCA 156)	6, 7, 9
Immigration and Nationality Act of 1952 (Public Law 414, 82nd Congress, 2nd Session, 66 Stat. 163)	7
Section 237 (8 USCA 1227)	7, 8
Section 243 (8 USCA 1253)	2, 7, 8
Section 243(h) (8 USCA 1253)	3, 4, 6, 15, 16
28 USC 2241 et seq.	1

	Page
28 USCA 2253	2
United States Revised Statutes, Section 1993	2

Texts

Higgins, Marguerite, "Reds Digesting China", Washington Post, October 1, 1951	11
Interim Decision No. 212, in the Matter of T. C., File No. A 6 730 648, decided November 7, 1950, Immigration and Naturalization Service "Monthly Review", January 1951, Vol. VIII, No. 7, pp. 95-98	10
Saturday Evening Post, October 13, 1951, p. 31, "They're Ruling China by Mass Murder"	12
Washington Times-Herald, Nov. 13, 1951, page 1	12
12 Words and Phrases Perm. Ed., page 136	8

No. 14,252

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LENG MAY MA,

Appellant,

vs.

BRUCE G. BARBER, District Director
Immigration and Naturalization
Service, San Francisco District,

Appellee.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

On January 26, 1954 there was filed in the United States District Court for the Northern District of California, Southern Division, on behalf of Leng May Ma, hereinafter referred to as appellant, a petition for a writ of habeas corpus (T. 3). The petition for writ of habeas corpus was denied on the ground that it failed to state facts sufficient to warrant the writ (T. 8). Notice of appeal was filed on January 29, 1954 (T. 8).

Jurisdiction of the District Court to entertain the petition for habeas corpus is conferred by 28 USC

2241 et seq. Jurisdiction of the Court of Appeals to review the District Court's final order denying the writ of habeas corpus is conferred by 28 USCA 2253.

STATUTE INVOLVED.

Title 8 USCA 1253.

“Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason. June 27, 1952, c. 477, Title II, ch. 5, Sec. 243, 66 Stat. 212.”

STATEMENT OF THE CASE.

Appellant was born in China in August of 1938. She claims to have acquired United States citizenship at the time of birth, pursuant to the provisions of Section 1993, United States Revised Statutes, as amended by the Act of May 26, 1934. After issuance of a travel affidavit by the American Consulate General at Hong Kong, on March 22, 1951, the appellant proceeded to the United States, arriving at the Port of San Francisco, California on May 4, 1951. After extensive hearings conducted by the Immigration and Naturalization Service, it was concluded that the ap-

pellant had failed to establish her claim. The decision of the Immigration and Naturalization Service was affirmed by the Board of Immigration Appeals on December 3, 1953.

Pursuant to a demand directed to appellant by the San Francisco District Office of the Immigration and Naturalization Service, she surrendered for contemplated deportation to Communist China on or about January 15, 1954. Under date of January 18, 1953, there was submitted on behalf of appellant to the District Director, Immigration and Naturalization Service, San Francisco, California, in accordance with prescribed regulations, an application for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952. On January 21, 1954, the San Francisco Office of the Immigration and Naturalization Service advised counsel for appellant that the appellant was not eligible for the relief requested (Exhibit A, attached to the petition; T. 7).

At the time the petition for writ of habeas corpus was filed in the case at bar, deportation to Communist China was imminent. In the petition it was alleged that the appellant was denied due process of law, that her deportation to Communist China was contrary to law and the expression of Congress not to deport a person to a country where such person would suffer physical persecution and that the decision of the Immigration and Naturalization Service rejecting the application for stay of deportation was an abuse of discretion.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The refusal of the Immigration and Naturalization Service to give any consideration to the petition filed by appellant seeking a stay of deportation on physical persecution grounds was contrary to law; that the action of the Service was based upon an erroneous interpretation of the statute; and that the appellant is one entitled to the relief afforded by the provisions of Section 1253(h), Title 8.

ARGUMENT.

The Supreme Court of the United States, in a number of decisions over a long period of time, has consistently held that habeas corpus is available in a proper case as a remedy against unlawful deportation from the United States.

United States v. Sing Tuck, 194 U.S. 161, 48 L. Ed. 917, 24 S. Ct. 621;

Bilokumsky v. Tod, 263 U.S. 149, 68 L. Ed. 221, 44 S. Ct. 54;

Heikkila v. Barber, 345 U.S. 229, 97 L. Ed. 972, 978, 73 S. Ct. 972.

The immigration administrative decision is subject to judicial review where the proceedings have not conformed to the traditional standards of fairness required by the due process of law clause of the Fifth Amendment to the Constitution of the United States. *Japanese Immigrant Case*, 189 U.S. 86, 47 L. Ed. 721,

725, 23 S. Ct. 611; *Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 71 L. Ed. 560, 563, 47 S. Ct. 302; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 94 L. Ed. 616, 628, 70 S. Ct. 445; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 97 L. Ed. 576, 584, 73 S. Ct. 472. Or where there has been arbitrariness or abuse of discretion by the administrative agency. *Low Wah Suey v. Backus*, 225 U.S. 460, 56 L. Ed. 1165, 1167, 32 S. Ct. 734; *Kwock Jan Fat*, 253 U.S. 464, 64 L. Ed. 1010, 1014, 40 S. Ct. 566; *Carlson v. Landon*, 342 U.S. 524, 96 L. Ed. 547, 558, 72 S. Ct. 525; *Yaris v. Esperdy*, 202 F. 2d 109, 112. The same general rule applies to determine whether or not the law has been correctly applied. *Gegiow v. Uhl*, 239 U.S. 3, 60 L. Ed. 114, 118, 36 S. Ct. 2; *Kessler v. Strecker*, 307 U.S. 22, 83 L. Ed. 1082, 1090, 59 S. Ct. 694; *Bridges v. Wixon*, 326 U.S. 135, 89 L. Ed. 2103, 2116, 65 S. Ct. 1443; *Fong Haw Tan v. Phelan*, 333 U.S. 6, 92 L. Ed. 433, 436, 68 S. Ct. 374. Cf. *McGrath v. Kristensen*, 340 U.S. 162, 95 L. Ed. 173, 181, 71 S. Ct. 224.

We have amply defined by the cases cited the power of the Courts to protect the rights of individuals in conformity with the fundamental principles of justice as embraced within the concepts of the Constitution of this nation. Quaere, applying those standards to the case at bar does the appellant's petition state a cause of action?

The petition was the only pleading filed in this cause. Thus, it becomes material to examine the allegations of the petition for the purpose of ascertaining whether a cause of action was stated of which a

Federal Court could take cognizance. For the purpose of this review the averments contained therein must be treated as true. *House v. Mayo*, 324 U.S. 42, 89 L. Ed. 739, 65 S. Ct. 517.

The appellant filed with the appropriate office of the Immigration and Naturalization Service a verified application praying for a stay of deportation as prescribed by the provisions of 8 C.F.R. 243.3(h) on the ground that she would be subject to physical persecution if deported to Communist China. The Immigration and Naturalization Service refused to grant a stay of deportation on the ground that the appellant was not eligible for the relief afforded by Section 243(h) of the Immigration and Nationality Act.

Even though the letter of the Immigration and Naturalization Service, Exhibit A of the pleadings, does not expressly set forth the basis for the rejection of the appellant's petition for a stay of deportation it must be presumed from the statements that the service relies upon the statutory construction previously asserted in the cases of *Ng Lin Chong v. McGrath* and *Wong Lai King v. McGrath*, 202 F. 2d 316. In the *Ng* and *Wong* cases, the Immigration Service contended that Section 20 of the Immigration Act of February 5, 1917, as amended, was not applicable to an excluded alien who had been paroled and bonded into the United States. Instead, it was declared that these cases were governed by Section 18 of the same Act. The Court of Appeals for the District of Columbia ruled adversely to the government on both contentions.

The petition in the case at bar presents an actual controversy between the appellant and the immigration officials over the legal right of the appellant to apply for such stay of deportation. Accordingly, the beneficial provisions of that part were denied this appellant contrary to law.

We think the logical reasoning of the Court of Appeals for the District of Columbia in the *Ng* and *Wong* cases should be applied to the instant matter. We readily admit that such decision was predicated upon construction of Sections 18 and 20 of the Immigration Act of 1917, as amended. We also recognize the rule that issuance of a writ of habeas corpus must be determined by the statute in force at the time the petition is filed. *United States v. Shaughnessy*, 185 F. 2d 347, 349; *United States v. Shaughnessy*, 187 F. 2d 137, 142, aff'd sub nom, *Harisiades v. Shaughnessy*, 342 U.S. 580.

The pertinent provisions of Sections 18 and 20 were not substantially modified by Public Law 414, 82nd Congress, 2nd Session, 66 Stat. 163, the Immigration and Nationality Act of 1952. A comparison of the language of Sections 18 and 20 of the Act of 1917 to the pertinent provisions of Sections 237 and 243 are contained in the appendix attached hereto (8 USCA 154, 156, 1227, 1253).

The Board of Special Inquiry which heard appellant's case at the time of her arrival in 1951 has power, only, to "determine whether an alien who has been duly held shall be allowed to land or *shall be deported*" (Sec. 17, Act of 1917; 8 USCA 153). "De-

portation" includes "exclusion"—*Knauff v. McGrath*, 181 F. 2d 839. This Court has held that "deportation" is the removal, or *sending back*, of an alien to the country whence he came. *Yonijuro Makasuji v. Seager*, 73 F. 2d 37; 12 Words and Phrases Perm. Ed., page 136.

The appellant was ordered excluded by a Board of Special Inquiry convened pursuant to the provisions of Section 17, Immigration Act of 1917 (8 USCA 153); and that Board determined that the appellant should be deported. No hearing was ever held under the provisions of the Immigration and Nationality Act.

The provisions of Section 237 of the Immigration and Nationality Act (8 USCA 1227) are restricted to an alien "who is excluded under *this Act*" and who is "immediately deported to the country whence he came." Since the appellant was neither "excluded" under the provisions of that Act nor "immediately deported, it is obvious that that section is not applicable.

Section 243 of that Act (8 USCA 1253) specifically provides for the deportation of any alien whether his removal be under the provisions of that Act "*or any other Act.*" It is under the provisions of this same section that the appellant filed her petition for a stay of deportation on physical persecution grounds. If it is established that her deportation must be effected under the provisions of this section, how can it be logically concluded that she is not eligible even to file for the relief requested.

In *Ng Fung Ho v. White*, 259 U.S. 276, 285, 66 L. Ed 938, Justice Brandeis said that deportation

“May result also in *loss of both property and life*; or of all that makes life worth living.” (Emphasis supplied.)

In *Wong Yang Sung v. McGrath*, *supra*, Justice Jackson, in a case involving a Chinese seaman who had deserted his vessel, said:

“A deportation hearing involves issues basic to human liberty and happiness and, in the present upheavals in lands to which aliens may be returned, perhaps to *life itself*.” (Emphasis supplied.)

The drastic nature of the penalty of deportation has been noted in many other cases, and the strictness with which the law must be construed against the Government and in favor of the alien is observed from the Court's pronouncement in *Fong Haw Tan v. Phelan*, *supra*. That case involved a Chinese who had been convicted of two murders, committed simultaneously, and sentenced to life imprisonment for each offense; the Attorney General sought to deport him under Section 20 of the 1917 Act, as one who had been “sentenced more than once.” In holding that, of two possible constructions of the deportation statute, the one favoring the alien must be adopted, the Court said:

“We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile, *Delgadillo v. Carmichael*, 332 U.S. 388, ante, 17,

58 S. Ct. 10. It is the forfeiture for misconduct of a resident in this country. Such a forfeiture is a penalty. To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."

Any contention that exclusion does not lead to deportation is as erroneous as it is unrealistic. At the time of filing the petition for a writ of habeas corpus deportation of this appellant to Communist China was imminent. We assert, with reasonable justification, that this appellant would suffer physical persecution and probable loss of life as a result of such arbitrary and capricious administrative action.

The Attorney General, through the Commissioner, Immigration and Naturalization Service, decided, when considering an application for adjustment of status under the Displaced Persons Act of 1948, that a Chinese temporarily in the United States as a student cannot be deported to Communist China because of "persecution or fear of persecution on account of race, religion or political opinions," Interim Decision No. 212, in the Matter of T. C., File No. A 6 730 648, decided November 7, 1950, Immigration and Naturalization Service "Monthly Review," January 1951, Vol. VIII No. 7, pp. 95-98. In that case, summing up his findings relative to the communistic nature of the de facto government of China, the Commissioner said:

“In summation, then, it will be concluded that the de facto Government of China is Communistic, and as Communistic as the Government of Russia and the countries behind the Iron Curtain.”

* * * * *

“Fear to Return: The applicant’s testimony above relative to displacement based upon his fear of persecution will be utilized to establish that other cardinal eligibility requisite, namely, that the applicant is unable to return to the country of his birth, nationality, or last residence, because of persecution or fear of persecution on account of his race, religion or political opinions. His testimony with respect to his opposition to Communism, and the acknowledgement that China is at this time a Communist-dominated country establishes that the applicant is unable to return to China because of his fear of persecution on account of his political opinions.”

It is a matter of common knowledge that China has been wholly overrun by the armed forces of the Chinese Communists; that the recognized government of the Republic of China fled to Formosa; that the principles of the Chinese Communist Government are contradictory to the principles of free and democratic government; and that the Communists have engaged in a campaign of mass murder of Chinese for vaguely defined “crimes”, and that the Communist press in China, itself, puts the number of executions in excess of a million.¹ It is equally common knowl-

¹“Reds Digesting China,” by Marguerite Higgins, Washington Post, October 1, 1951.

edge that the Communists are ruling China by mass murder.²

In a release dated February 23, 1954, Washington, D.C., the House Appropriations Committee stated that Walter S. Robertson, Assistant Secretary of State for Far Eastern Affairs testified Red Chinese have slaughtered about 15,000,000 of their own people since 1949 which showed "just about the bloodiest pattern that the Communists have followed in any country in the world."

In view of these known conditions there can be no room for doubt that appellant would be the likely object of the Communist regime.

The United Nations, through the persistent efforts of the United States, refused for a period of approximately two years to mediate the Korean situ-

²"They're Ruling China by Mass Murder," Saturday Evening Post, October 13, 1951, p. 31; at page 167, the author points out that under the most intense suspicion, and consequent danger of extermination, are Chinese "individuals who once worked for or associated with Europeans, *particularly Americans*," and that "in a majority of cases Chinese are arrested not because they commit some overt act against the state, but because they belong to classes or categories distrusted by the communists and suspected of harboring dangerous (unorthodox) thoughts. They are sources of *potential* opposition to the regime." (Emphasis supplied.)

The United Nations General Assembly was informed November 12, 1951, that there would be no lasting peace with Red China, in Korea, or elsewhere, so long as China is dominated by "the Communist rule of mass murder"—Washington Times-Herald, November 13, 1951, page 1. Dr. T. F. Tsiang, the Chinese representative before the U. N. General Assembly, stated official announcements by Chinese Communist authorities admitted that 1,176,000 so-called counter-revolutionaries had been liquidated from October 1, 1949 to October 1, 1950, in the provinces of China, including that from which appellant originally came.

ation unless all parties agreed that captured Chinese Communist soldiers would not be repatriated to Communist China against their wishes. During this period, this nation, alone, sustained 25,000 casualties. Let's hope that these members of our armed forces did not suffer in vain.

Return of any individual despite his objection to a Communist-dominated country would be flatly inconsistent with the principle adhered to in the Korean prisoner of war negotiations. Deportation of the appellant to Communist tyranny would stultify our national policy of protecting those who have fled Communist opposition and make mockery of our national efforts to win over world opinion for the cause of freedom.

This Court in *Carmichael v. Delaney*, 170 F.2d 239, at page 245, stated:

"Throughout history banishment or exile has been looked upon as a penalty little less dreadful than death. To one in appellee's situation, exclusion is in substance and practical effect the equivalent of banishment. It involves the same severance from home and existing ties that the individual suffers who is expelled from the country in a proceeding to deport. There is no difference in their loss of freedom of movement or in the nature of the hardships they are called upon to undergo. *The sole distinction resides in the mere matter of nomenclature.* The distinction, we think, is of no moment so far as concerns the constitutional guaranty of due process of law." (Emphasis supplied.)

The statute in effect at the time of filing this petition required the Attorney General to consider and exercise his discretion consistent "with the fundamental principles of justice embraced within the conception of due process of law." *Tang Tung v. Edsell*, 223 U.S. 673, 56 L.Ed. 606, 610, 32 S.Ct. 569; *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 95 L.Ed. 817, 71 S.Ct. 624; *Carlson v. Landon*, 342 U.S. 524, 96 L.Ed. 547, 72 S.Ct. 525.

In *Stack v. Boyle*, 342 U.S. 1, 96 L.Ed. 317, Mr. Chief Justice Vinson warned that we should not "inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against in passing the statute." This warning is particularly appropriate in the setting of the instant case. The Attorney General, through his administrative officers, arbitrarily and without just cause, condemned the appellant to probable execution.

It is well realized that this Court in *Jew Sing v. Barber*, 215 F.2d 906, sustained the position of the District Director of the Immigration and Naturalization Service. However, it should be noted that certiorari was granted in the case of *Jew Sing v. Barber*, 348 U.S. 910, and that the decision of the Court of Appeals for the Ninth Circuit was reversed with instructions that the case be remanded to the District Court for dismissal on the suggestion of mootness, 350 U.S. 898. We would also like to call attention of the Court to the decision of the Court of Appeals for the District of Columbia in *Lim Fong v. Brownell*, 215 F.2d 683, in which case that Court reached an

opposite conclusion. Also compare *U. S. v. Shaughnessy*, 234 F.2d 715.

The Fifth Amendment to the Constitution of the United States provides that "no person shall * * * be deprived of life, liberty, or property, without due process of law." We assert that there was an invasion of that constitutional right by the Immigration and Naturalization Service.

It is within the province of the Courts to test the validity of oppressive administrative action in a habeas corpus proceeding. This action was brought for that specific purpose.

CONCLUSION.

To prevent abuse of the Attorney General's extraordinary powers over the lives and destinies of our foreign born, judicial intervention is appropriate herein. The fate of the appellate is at stake.

Congress as recently as August 7, 1953, when enacting the Refugee Relief Act of 1953, recognized that it was impossible for people instilled with democratic philosophy to live in Communist dominated countries. It was the purpose and intent of Section 1253(h), Title 8, to prevent, for humanitarian reasons, deportation of worthy aliens who would suffer physical persecution.

The appellant was ordered excluded and deported and the contemplated action of the Immigration Service is deportation. Such deportation is included within

the statutory language of the provisions of Section 1253(h). Failure of the Immigration and Naturalization Service to consider the appellant's verified petition filed pursuant to the provisions of that part was a denial of a vital right guaranteed by the Constitution and laws of our nation. The failure of the Court below to consider this problem was error.

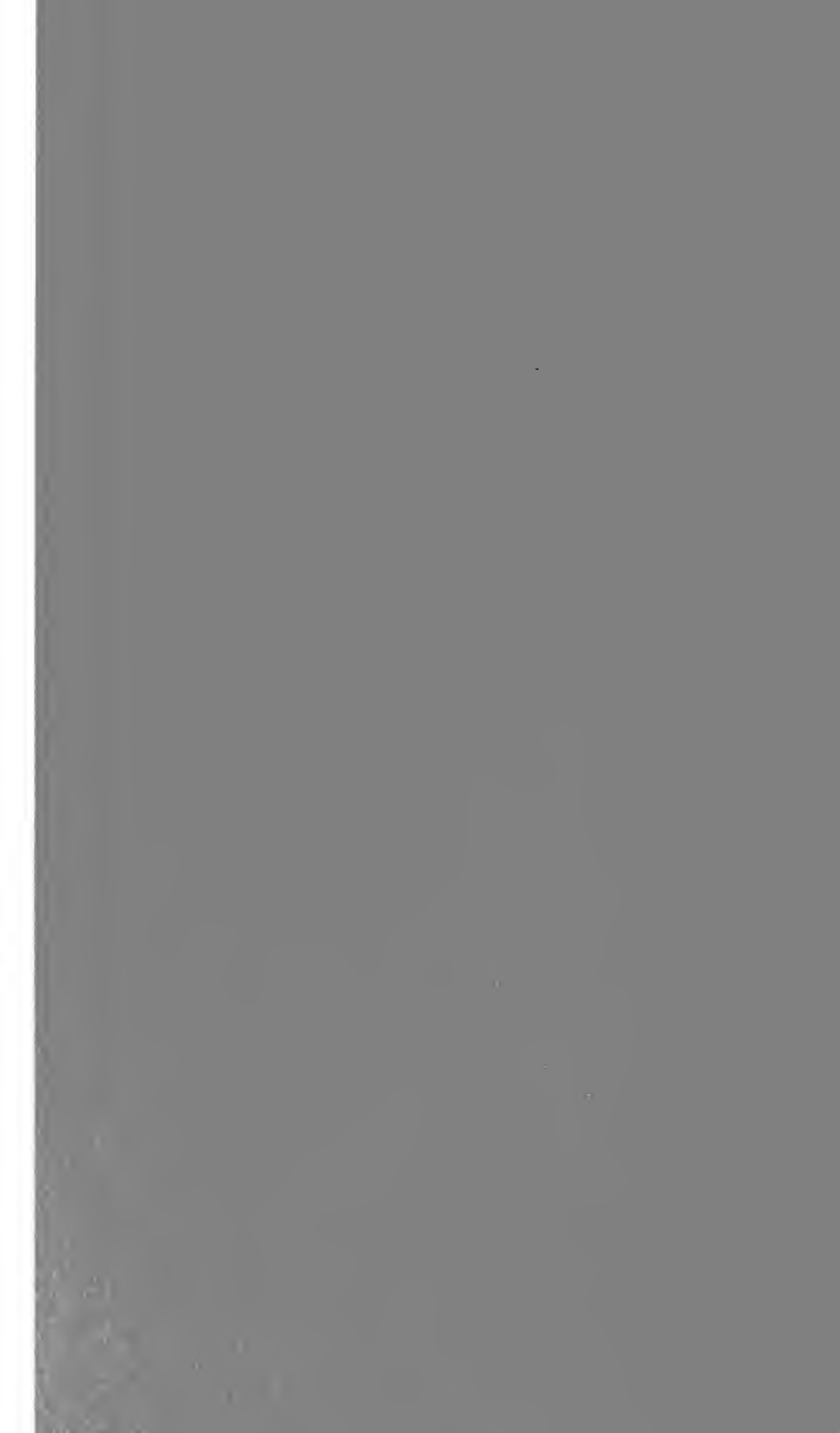
The decision should be reversed with instructions that the writ of habeas corpus issue.

Dated, San Francisco, California,
October 26, 1956.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH S. HERTOGS,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.



Appendix

Section 18—Act of February 5,
1917, 8 U.S.C.A. 154.

“Immediate deportation of aliens brought in in violation of law; cost of maintenance and return.

All aliens brought to this country in violation of law shall be immediately sent back, in accommodations of the same class in which they arrived, to the country whence they respectively came, on the vessels bringing them, unless in the opinion of the Attorney General immediate deportation is not practicable or proper. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came. It shall be unlawful for any master, purser, person in charge, agent, owner, or consignee of any such vessel to refuse to receive back on board thereof, or on board any other vessel owned or operated by the same interests, such aliens; or to fail to detain them thereon; or to refuse or fail to return them in the manner aforesaid to the foreign port from which they came; or to fail to pay the

Section 237, Immigration and Nationality Act, 8 U.S.C.A. 1227.

“Immediate deportation of aliens excluded from admission or entering in violation of law—maintenance expenses.

(a) Any alien (other than an alien crewman) arriving in the United States who is excluded under this chapter, shall be immediately deported to the country whence he came, in accommodations of the same class in which he arrived, on the vessel or aircraft bringing him, unless the Attorney General, in an individual case, in his discretion, concludes that immediate deportation is not practicable or proper. The cost of the maintenance including detention expenses and expenses incident to detention of any such alien while he is being detained, as well as the transportation expense of his deportation from the United States, shall be borne by the owner or owners of the vessel or aircraft on which he arrived, except * * *

Unlawful practice of transportation lines.

(b) It shall be unlawful for any master, commanding offi-

cost of their maintenance while on land; or to make any charge for the return of any such alien, or to take any security for the payment of such charge; or to take any consideration to be returned in case the alien is landed; * * *

cer, purser, person in charge, agent, owner, or consignee of any vessel or aircraft (1) to refuse to receive any alien (other than an alien crewman), ordered deported under this section back on board such vessel or aircraft or another vessel or aircraft owned or operated by the same interests; (2) to fail to detain any alien (other than an alien crewman) on board any such vessel or at the airport of arrival of the aircraft when required by this chapter or if so ordered by an immigration officer, or to fail or refuse to deliver him for medical or other inspection, or for further medical or other inspection, as and when so ordered by such officer; (3) to refuse or fail to remove him from the United States to the country whence he came; (4) to fail to pay the cost of his maintenance while being detained as required by this section or section 1223 of this title; (5) to take any fee, deposit, or consideration on a contingent basis to ^{be} kept or returned in case the alien is landed or excluded; * * *

¹So in original. Probably should read "be".

Section 20, Act of February 5,
1917, 8 U.S.C.A. 156.

“Ports to which aliens to be
deported, cost of deportation.

The deportation of aliens provided for in this chapter shall, at the option of the Attorney General, be to the country whence they came or to the foreign port at which such aliens embarked for the United States; or, if such embarkation was for foreign contiguous territory, to the foreign port at which they embarked for such territory; or, if such aliens entered foreign contiguous territory from the United States and later entered the United States, or, if such aliens are held by the country from which they entered the United States not to be subjects or citizens of such country, and such country refuses to permit their reentry, or imposes any condition upon permitting reentry, then to the country of which such aliens are subjects or citizens, or to the country in which they resided prior to entering the country from which they entered the United States.

* * *

Section 23 of the Internal Security Act of 1950 (Public Law 831, 81st Cong., 2d Sess.; 64 Stat.) 8 U.S.C.A. 156, amended Section 20 of the Immigration Act of February 5, 1917 so as to read, in pertinent part, as follows:

"Sec. 20(a) That the deportation of aliens provided for in this Act and all other immigration laws of the United States shall be directed by the Attorney General to the country specified by the alien, if it is willing to accept him into its territory; otherwise such deportation shall be directed by the Attorney General within his discretion and without priority of preference because of their order as herein set forth, either to the country from which such alien last entered the United States or to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory; or to any country in which he resided prior to entering the country from which he entered the United States or to the country which had sovereignty over the birthplace of the alien at the time of his birth; or to any coun-

Section 243 of the Immigration and Nationality Act, 8 U.S.C.A. (effective December 24, 1952).

"Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country.

(a) The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. * * * Thereupon deportation of such alien shall be directed to any country of which such alien is a subject¹ national, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particu-

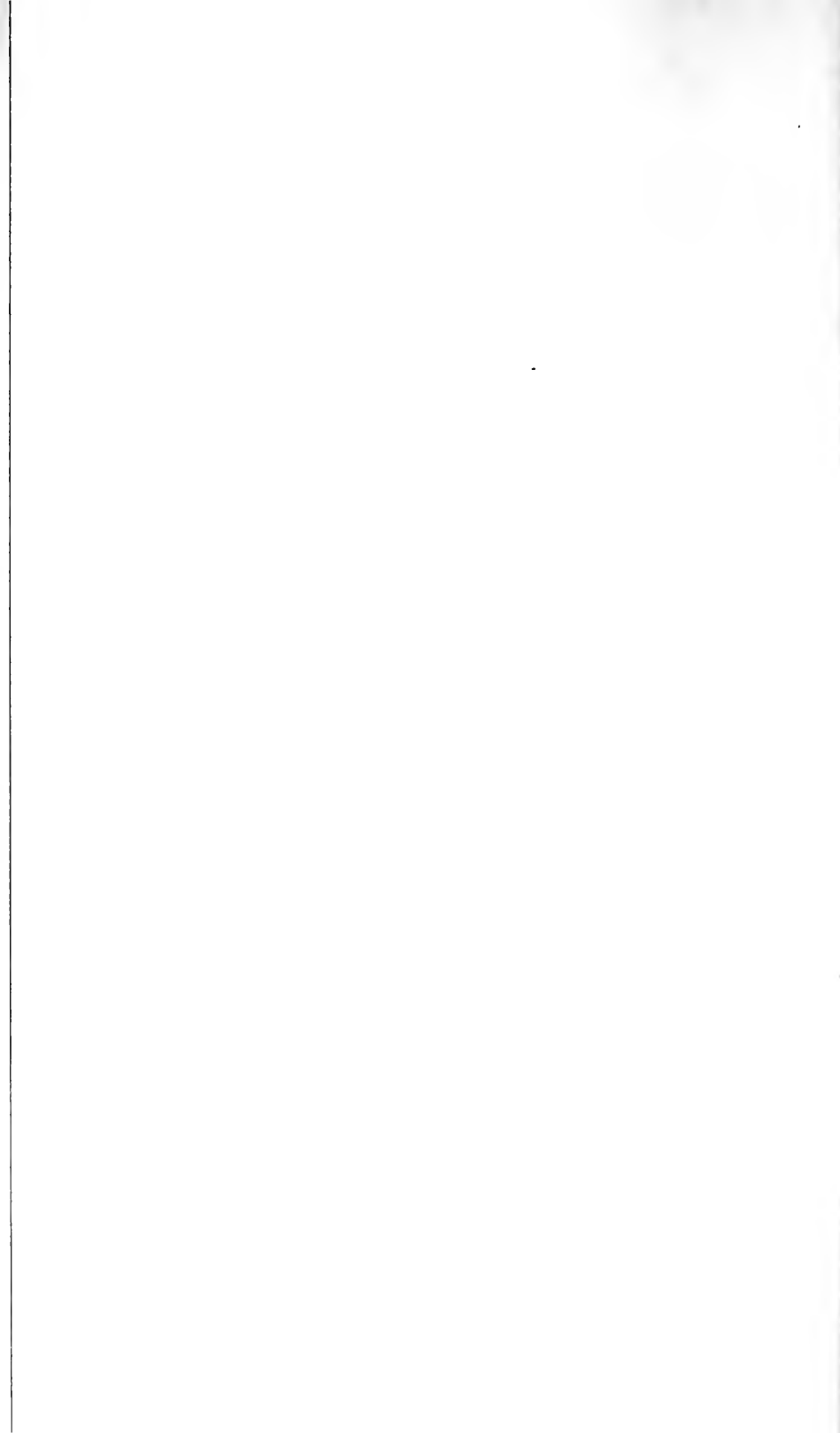
¹So in original. Probably should read with a "s".

try of which such an alien is a subject, national, or citizen; or to the country in which he was born; or to the country in which the place of his birth is situated at the time he is ordered deported; or, if deportation to any of the said foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory. * * * No alien shall be deported under any provisions of this Act to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

lar case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either— * * *.

Withholding of deportation.

(h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason."



No. 14,252

IN THE

United States Court of Appeals
For the Ninth Circuit

LENG MAY MA,

Appellant,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco District,

Appellee.

REPLY BRIEF.

LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

422 Post Office Building,

7th and Mission Streets,

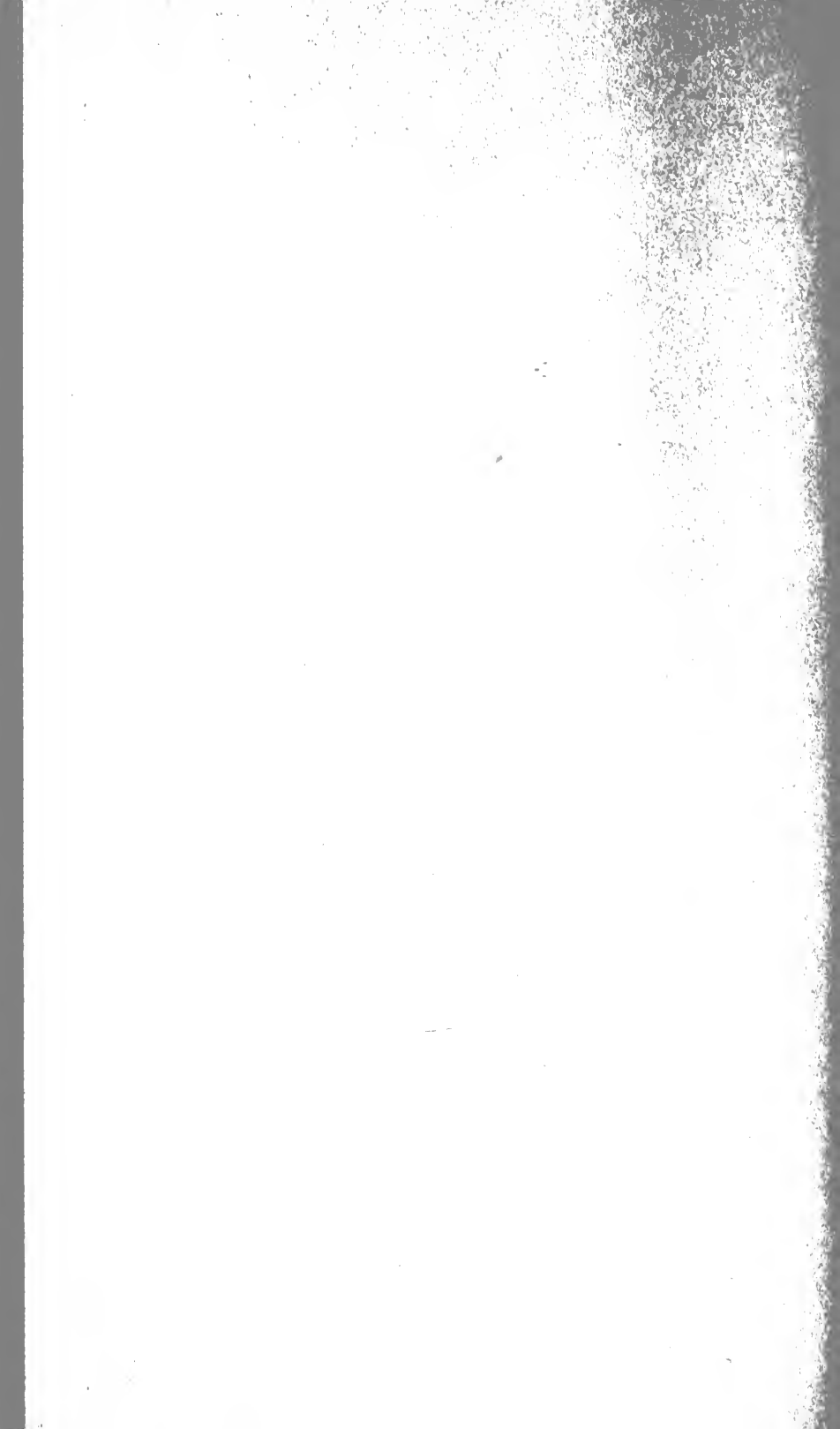
San Francisco 1, California,

Attorneys for Appellee.

FILED

DEC 20 1956

PAUL P. O'BRIEN, C



Subject Index

	Page
Statement of the case	1
Statute involved	2
Question presented	3
Argument	3
Conclusion	5

Table of Authorities Cited

Cases	Pages
Dong Wing Ott v. Shaughnessy, 142 F. Supp. 379	5
Jew Sing v. Barber, 215 F. 2d 906	2, 3
Jew Sing v. Barber, 348 U.S. 910	3
Kaplan v. Tod, 267 U.S. 228	4, 5
Lim Fong v. Brownell, 215 F. 2d 683	3, 4
Nishimura Ekiu v. U. S., 142 U.S. 651	5
Shaughnessy v. Mezei, 345 U.S. 206	5
United States v. Corsi, 65 F. 2d 322 (Cir. 2)	4
United States ex rel. Fong Foo v. Shaughnessy, 234 F. 2d 715	3, 4
United States v. Ju Toy, 198 U.S. 253	5
United States v. Munsingwear, 340 U.S. 36, 39-40	4
United States v. Spar, 149 F. 2d 881 (Cir. 2)	4

Statutes

8 C.F.R. 243(3)(b)	2
Immigration and Nationality Act of 1952, Section 243(h), (8 U.S.C.A. 1253(h))	2, 3, 5

No. 14,252

IN THE

**United States Court of Appeals
For the Ninth Circuit**

LENG MAY MA,

Appellant,

VS.

BRUCE G. BARBER, District Director,
Immigration and Naturalization
Service, San Francisco District,

Appellee.

REPLY BRIEF.

STATEMENT OF THE CASE.

The petition for writ of habeas corpus was filed by appellant on January 26, 1954. An ex parte application made the same day to the District Court for the issuance of the writ or an order to show cause was denied. On January 28, 1954 an order denying the petition for writ of habeas corpus was filed. (Tr. 8.) The appeal was noted from the order.

The status of the appellant herein is identical with the status of the appellant *Jew Sing* in the case of *Jew Sing v. Barber*, 215 F. 2d 906. Leng May Ma

sought admission to the United States at the Port of San Francisco. She was *excluded*. (Tr. 4.) She was notified to surrender herself to the officer in charge of the Immigration and Naturalization Service to be returned to the country from which she came.

In accordance with the notice she did surrender and an application was filed for a stay of deportation under the provisions of Section 243(h) of the Immigration and Nationality Act of 1952 (8 U.S.C. 1253(h)) and pursuant to the provisions of 8 C.F.R. 243(3)(b).

The application was denied on the ground that having been *excluded* she was not within the United States and was therefore not eligible for the relief afforded by Section 243(h).

STATUTE INVOLVED.

Section 243(h), Immigration and Nationality Act of 1952 (8 U.S.C.A. 1253(h)):

“The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.”

QUESTION PRESENTED.

Is a person who has been *excluded* from the United States eligible for discretionary consideration by the Attorney General under 8 U.S.C. 1253(h)?

ARGUMENT.

The brief filed by appellant herein is almost entirely copied from the brief filed by the appellant in the *Jew Sing* case, (No. 14,146, in this Court). The bottom paragraph on page 14 of the brief herein has been added.

The added paragraph (p. 14) states:

“It is well realized that this Court in *Jew Sing v. Barber*, 215 F.2d 906, sustained the position of the District Director of the Immigration and Naturalization Service. However, it should be noted that certiorari was granted in the case of *Jew Sing v. Barber*, 348 U.S. 910, and that the decision of the Court of Appeals for the Ninth Circuit was reversed with instructions that the case be remanded to the District Court for dismissal on the suggestion of mootness, 350 U.S. 898. We would also like to call attention of the Court to the decision of the Court of Appeals for the District of Columbia in *Lim Fong v. Brownell*, 215 F.2d 683, in which case that Court reached an opposite conclusion. Also compare *U.S. v. Shaughnessy*, 234 F.2d 715.”

In *Jew Sing v. Barber*, 215 F.2d 906 this Court said (p. 907):

“The question is whether an alien seeking admission to the United States is ‘within the United

States' while his application for such admission is under consideration and after it has been decided against him. We think not. His status as a person released by the immigration authorities on bond is still that of a person without the United States seeking admission."

Kaplan v. Tod, 267 U.S. 228;

U. S. v. Spar, 149 F. 2d 881 (Cir. 2);

U. S. v. Corsi, 65 F. 2d 322 (Cir. 2).

Appellant has "well realized" that the *Jew Sing* decision is directly in point and is against him. No attempt is made in the brief to persuade this Court that said decision is erroneous. Certiorari *was* granted by the Supreme Court, but before the matter was briefed or heard by the Supreme Court, a renewed application for naturalization made by *Jew Sing* was granted and he became an American citizen. The case was therefore moot and upon motion made following *United States v. Munsingwear*, 340 U.S. 36, 39-40, the Supreme Court reversed the judgment and remanded with direction to dismiss as moot.

Appellant has cited the District of Columbia case of *Lim Fong v. Brownell*, 215 F.2d 683, as reaching "an opposite conclusion".

The *Lim Fong* case was cited to this Court in a supplemental brief filed by appellant in *Jew Sing*. Appellant there, and again here, fails to point out to the Court that Lim Fong was ordered deported in an *expulsion* proceeding, not exclusion. *Lim Fong* was within the United States. The case of *United States*

ex rel. Fong Foo v. Shaughnessy, 234 F. 2d 715 is also a deportation *expulsion* proceeding, not exclusion.

Appellant has cited no authority in support of the proposition that a person excluded from admission to the United States is *within* the United States. The Supreme Court has repeatedly said No.

Nishimura Ekiu v. U. S., 142 U.S. 651;

United States v. Ju Toy, 198 U.S. 253;

Kaplan v. Tod, 267 U.S. 228;

Shaughnessy v. Mezei, 345 U.S. 206;

Dong Wing Ott v. Shaughnessy, 142 F. Supp. 379, D.C., S.D., N.Y., July 17, 1956.

CONCLUSION.

It is submitted that appellant is not an "alien within the United States" within the meaning of Section 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1253(h), and is therefore not entitled to make application for a stay of deportation under the provisions of said section. The order of the Court below should be affirmed.

Dated, San Francisco, California,
December 17, 1956.

Respectfully submitted,

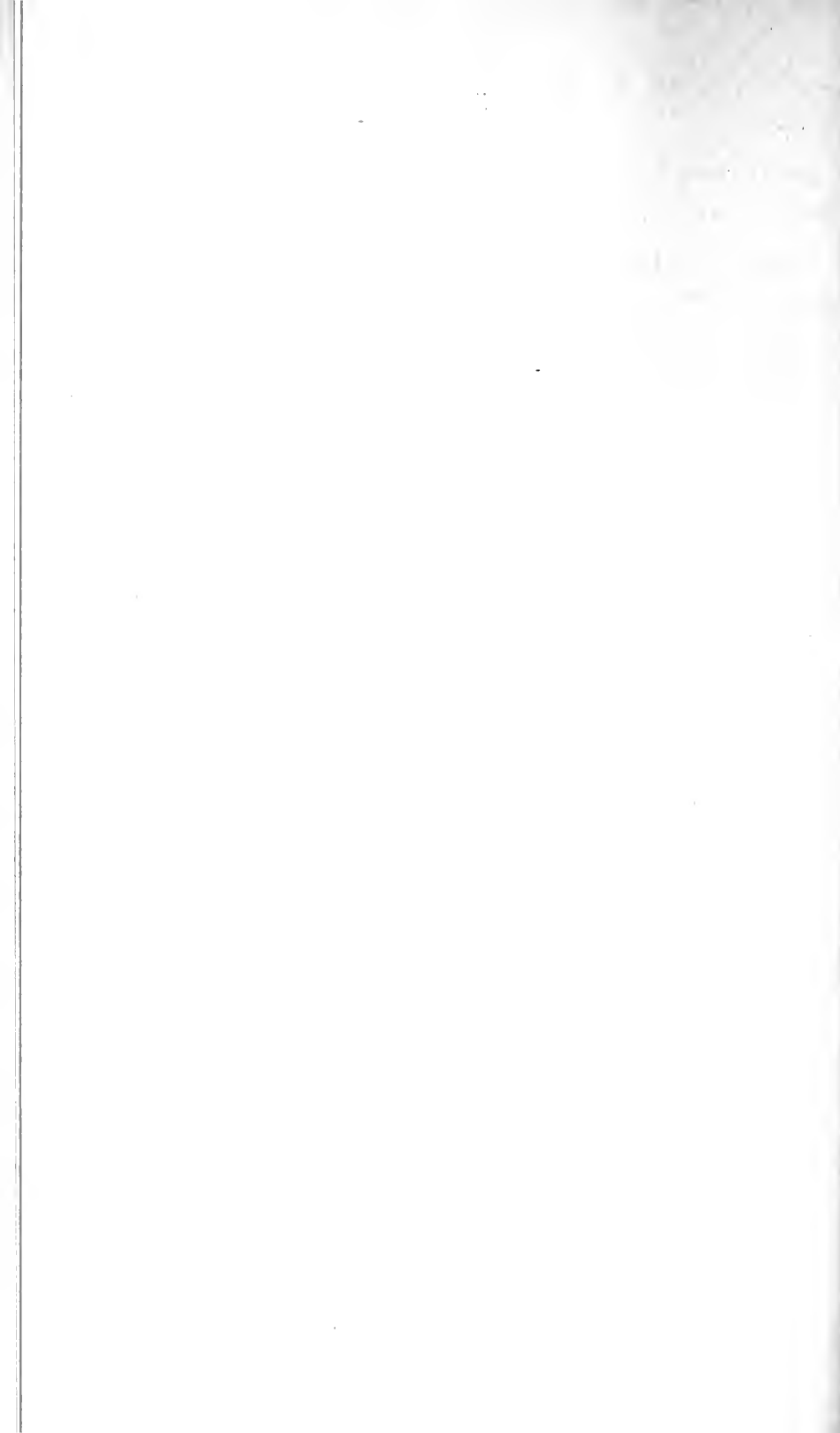
LLOYD H. BURKE,

United States Attorney,

CHARLES ELMER COLLETT,

Assistant United States Attorney,

Attorneys for Appellee.



No. 14,253

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN CRUYSEN,

Appellant,

VS.

KENYON J. SCUDDER, as Superintend-
ent, California Institution for Men,
Chino,

Appellee.

BRIEF OF APPELLEE.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

CHARLES E. MCCLUNG,

Deputy Attorney General of the State of California,

600 State Building, San Francisco 2, California,

Attorneys for Appellee.

FILED

PAUL D. O'P

ET C



Subject Index

	Page
Statement of facts.....	2
Appellant's contentions	3
Summary of appellee's argument.....	4
Argument	4
I. Since appellant has never asserted any federal question in the State of California he has failed to exhaust his state remedy and the appeal must be dismissed.....	4
II. The petition for habeas corpus did not present a fed- eral question since all that was alleged was a proce- dural error under the law of California.....	6
III. The judgment should be affirmed since the judge below determined from an examination of the state proceed- ings that the state court had given appellant a fair hearing and come to a satisfactory conclusion.....	8
Conclusion	11

tions from prisoners at Chino, it being a minimum security institution which is attended usually by men about to be released from confinement. No order to show cause having been issued or served, appellee was probably ignorant of the proceeding.

The Attorney General of the State of California is attorney for Mr. Scudder. The first knowledge this office had of this proceeding was that the matter was on the calendar of the Court of Appeals in Los Angeles for July 16, 1954. The case was apparently then transferred to the San Francisco calendar.

We have borrowed the record from the Court of Appeals and prepared our brief as rapidly as the exigencies of business of this office will permit.

STATEMENT OF FACTS.

The petition for habeas corpus alleges that Cruysen was charged by information with the crime of burglary in Los Angeles County. (R. 6.) Another man, one William Van Bibber, had previously been charged by a separate information with the same burglary. The two informations did not refer to each other or otherwise indicate a joint crime. (R. 6.)

Van Bibber and appellant went to trial together. (R. 6.) There was no motion to consolidate the two informations or otherwise amend the accusatory pleadings to jointly charge Van Bibber and appellant with the commission of the burglary, nor was there any order of the Court to that effect. (R. 6.)

Thus, the appellant alleges he was deprived of due process of law.

Certain other facts relating to this matter appear in the opinion of the District Court of Appeal of the State of California which affirmed appellant's conviction. (*People v. Van Bibber*, 96 Cal. App. 2d 273.*

From the California opinion it appears that Cruysen and Van Bibber were represented by counsel at their trial. In fact, they employed the same counsel. It further appeared that neither man objected to going to trial together nor was there any request for a dismissal or consolidation.

The judge below, after considering the matter, decided that the facts as alleged and admitted did not show a violation of the Constitution of the United States and accordingly denied the application.

This is the appeal.

APPELLANT'S CONTENTIONS.

Appellant argues that it was a denial of due process of law to try appellant jointly with Van Bibber without either ordering a consolidation of the informations or filing an amended joint-information.

*That the judge below had before him these facts is shown by his order denying the application. (R. 38.) That he had power to consider them is not disputed. (See *Brown v. Allen*, 344 U.S. 433.)

II.

**THE PETITION FOR HABEAS CORPUS DID NOT PRESENT A
FEDERAL QUESTION SINCE ALL THAT WAS ALLEGED WAS
A PROCEDURAL ERROR UNDER THE LAW OF CALIFORNIA.**

It does not require extended argument to demonstrate that the point which appellant seeks to raise in this Court is a matter of state law which has been determined adversely to him by the California Court. The decision of the California Court on the law of California is of course binding on the federal Courts.

Let us briefly examine appellant's point. It is claimed that appellant and his co-defendant were charged by separate informations. There should have been either a joint information or consolidation. Concededly, if both defendants had been charged in a joint information, or if there had been a formal order of consolidation appellant would have no complaint. Appellant's claim is that the United States Constitution somehow gives him the right to be charged by a joint information.

But is it not at once apparent that the right for which appellant so strenuously argues is one which is secured to him, if at all, only by the procedural law of the State of California? No authorities are cited, and we deem it to be evident that none can be found, stating that the "right" to be jointly charged is guaranteed by the Fourteenth Amendment. Certainly there is nothing in the United States Constitution prohibiting charging two men with the same crime in separate informations.

Under California law it has been held erroneous to try jointly two defendants who have been charged in separate informations. *People v. Foward*, 134 Cal. App. 723, 725; *California Penal Code*, §§ 954, 1098. Unless an accused can show that the joint trial resulted in substantial prejudice the error, under California law, is not prejudicial. *People v. Shepherd*, 14 Cal. App. 2d 513, 520.

The California Court has held that appellant was not substantially prejudiced by standing joint trial and that he had waived his rights by failing to object in the trial Court. (*People v. Van Bibber and Cruysen*, 96 Cal. App. 2d 273, 275 [215 Pac. 2d 106].) Thus under the law of California the conviction was proper.

The federal courts must accept the determination of the California Court on a matter of California law. See *Del Marmol v. Heinze* (9th Cir., 1953), 205 Fed. 2d 114.

The federal courts are most certainly not going to attempt to dictate to the California Courts that two co-defendants should be charged by joint information rather than separate informations.

III.

THE JUDGMENT SHOULD BE AFFIRMED SINCE THE JUDGE BELOW DETERMINED FROM AN EXAMINATION OF THE STATE PROCEEDINGS THAT THE STATE COURT HAD GIVEN APPELLANT A FAIR HEARING AND COME TO A SATISFACTORY CONCLUSION.

The judge below dismissed the application for writ of habeas corpus after examining it in light of the opinion in the state Court. He found that the matter sought to be presented in the federal forum had been fully litigated in the Courts of California and that the state Court had come to a satisfactory conclusion. (R. 38.)

The California Court held that since appellant voluntarily went to trial with his co-defendant and made no objection to the joint trial, he could not question the failure to charge him jointly for the first time on appeal especially where there was shown no substantial prejudice to his rights. (96 Cal. App. 2d 273, 275.)

The California Court disposed of Crysen's point as follows:

"The first complaint is that the trial court failed to order a consolidation of the two informations for trial under section 954 of the Penal Code. Under that section and section 1098 of the Penal Code it has been held error to consolidate for trial two separate informations against different defendants. Such error is, however, one of procedure and not jurisdictional. (People v. Shepherd, 14 Cal. App. 2d 513, 520 [58 Pac. 2d 970].)

“So far as the record here is concerned, the two defendants were to be tried on the same day, before the same jury, on the same charge, and apparently all parties permitted this procedure. No objection or complaint was made to this method of trial. The reporter’s transcript indicates that the two defendants were being ‘jointly’ tried on the same charge. Although the record does not contain a signed order of consolidation the facts shown are tantamount to an order of consolidation. Defendant should not now be heard to complain for the first time on appeal. Since appellant was charged with the same crime, committed at the same time, and the same evidence was applicable to both defendants, and since the error committed was one of procedure and not of jurisdiction and the evidence fully justifies the conviction, it cannot be said that a miscarriage of justice resulted. Under section 4½, article VI, of the Constitution the error was not prejudicial.” (*People v. Van Bibber*, 96 Cal. App. 2d 273, 274-275.)

The judge below adopted the California conclusion relying on *Brown v. Allen*, 344 U.S. 433.

In *Brown v. Allen*, the Court stated at pp. 457-458:

“The fact that no weight is to be given by the Federal District Court to our denial of certiorari should not be taken as an indication that similar treatment is to be accorded to the orders of the state courts. * * * Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the District Court may properly depend upon the state’s resolution of the issue.”

The Court in that opinion further stated, 344 U.S. at pages 464-465, 73 S. Ct. at page 411:

“Although they have the power, it is not necessary for federal courts to hold hearings on the merits, facts or law a second time when satisfied that federal constitutional rights have been protected. * * * As the state and federal courts have the same responsibilities to protect persons from violation of their constitutional rights, we conclude that a federal district court may decline, without a rehearing of the facts, to award a writ of habeas corpus to a state prisoner where the legality of such detention has been determined, on the facts presented, by the highest state court with jurisdiction, whether through affirmance of the judgment on appeal or denial of post-conviction remedies.”

The cases that have followed *Brown v. Allen* have consistently applied this principle, leaving it to the district judge to determine whether the state court has satisfactorily disposed of the applicant's claims.

Chessman v. People, (9th Cir. 1953), 205 Fed. 2d, 128, 129;

Boyden v. Webb, (9th Cir. 1953), 208 Fed. 2d 201, 203;

United States ex rel. O'Connell v. Ragen, (7th Cir. 1954), 212 Fed. 2d 272, 273;

United States ex rel. Gawron v. Ragen, (7th Cir. 1954), 211 Fed. 2d 902, 904.

Since the judge below exercised his discretion as recognized by the above cited cases in refusing to

grant a hearing the judgment denying the writ should be affirmed.

CONCLUSION.

The argument of appellant is based on a technicality. Appellant was represented by counsel, had full and fair notice of the charge against him, went to trial by jury, was convicted, and had his conviction reviewed by the California District Court of Appeal.

Whether he was charged by a joint information or a separate information is most certainly not of sufficient stature as a federal question to nullify all the California proceedings.

It is respectfully submitted that the judgment be affirmed.

Dated, San Francisco, California,

August 6, 1954.

EDMUND G. BROWN,

Attorney General of the State of California,

CLARENCE A. LINN,

Assistant Attorney General of the State of California,

CHARLES E. McCLUNG,

Deputy Attorney General of the State of California,

Attorneys for Appellee.



No. 14266

IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

Brief Resisting Appeal from the United States District
Court for the Judicial District of Arizona
To the United States Court of Appeals
For the Ninth Circuit

JACK D. H. HAYS
*United States Attorney
for the District of Arizona*

ROBERT S. MURLLESS
Assistant U. S. Attorney

Attorneys for Appellee
204 U. S. Court House
Phoenix, Arizona

FILED

JAN - 3 195

PAUL P. O'BRIEN,
CLERK

TABLE OF CONTENTS

	Page
Jurisdictional Statement	1, 2
Theories of Prosecution and Defense.....	2
Statement of Facts.....	2, 3, 4, 5, 6
Issues on Appeal.....	6, 7
Appellee's Argument on Specification I.....	7, 8, 9, 10
Proposition of Law No. 1.....	7, 8
Proposition of Law No. 2.....	8, 9, 10
Appellee's Argument on	
Specification II	11, 12, 13, 14, 15, 16
Proposition of Law No. 3.....	14
Proposition of Law No. 4.....	14, 15
Proposition of Law No. 5.....	15, 16
Appellee's Argument on Specification III.....	13, 16, 17, 18
Proposition of Law No. 6.....	16, 17
Proposition of Law No. 7.....	13, 17, 18
Conclusion	18

TABLE OF STATUTES CITED

Title 18, U.S.C. Section 3231.....	2
Title 28, U.S.C. Section 1291.....	2
Title 26, U.S.C. Section 145(b).....	3, 8

TABLE OF CASES CITED

	Page
Dunn v. United States, 284 U.S. 390, at p. 393.....	17, 18
Gaunt v. United States, U.S.C.A. 1st Cir., July, 1950, 184 Fed. 2d. 284 (pp. 286, 291).....	7, 14
Holmgren v. United States, October term, 1909, 217 U.S. 509, p. 521.....	14
Malatkoski and Seigel v. United States, U.S.C.A. 1st Cir., January, 1950, 179 Fed. 2d 905, pp. 912, 913, 914	14
Massenberg v. United States, U.S.C.A. 4th Cir., April, 1927, 19 Fed. 2d 62.....	14
Nichelson v. United States, October term, 1948 335 U.S. 469.....	14
Steckler v. United States, U.S.C.A. 2nd Cir., April, 1925, 7 Fed. 2d 59, p. 60.....	17
Sullivan v. United States, U.S.C.A. 9th Cir., February, 1935, 75 Fed. 2d 622.....	9, 17
U.S. v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, cert. denied, 291 U.S. 662....	8
United States v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, p. 870.....	9
United States v. Murdock, cert. to the 7th Cir., October term, 1933, 290 U.S. 389.....	9
United States v. Norris, U.S.C.A. 2nd Cir., April 1953, 205 Fed. 2d 828.....	9

TABLE OF TEXTS CITED

Wigmore on Evidence, 3rd Edition, 1940, Vol. 1. Sec. 58	16
--	----

IN THE
United States
Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

Brief Resisting Appeal from the United States District
Court for the Judicial District of Arizona
To the United States Court of Appeals
For the Ninth Circuit

JURISDICTIONAL STATEMENT

The Appellant has stated certain facts relating to the jurisdiction of the courts, above mentioned. A regularly constituted grand jury, in due course of their considerations, found an indictment against Appellant, and returned a true bill which was filed on the 28th day of May, 1953.

Pursuant to Appellant's statement of jurisdictional matters, and the above reference to the grand jury, regularly constituted, of the Judicial District of Arizona, the United States Court for the Judicial District

of Arizona has jurisdiction hereof under *Title 18, United States Code, Section 3231*, and this court has jurisdiction under *Title 28, United States Code, Section 1291*.

THEORIES OF PROSECUTION AND DEFENSE

Appellee established the amount of unreported income in this case by the indirect method known as the "bank deposit method." To support such method, Appellee proved that the Appellant's records did not reflect his true receipts from medical practice, and proved several substantial receipts which were not reflected in his books of account. Appellant made no effort to dispute the Government's allegation as to the amount of unreported income, but apparently based his defense on an attempt to show that the unreported income was not wilfully omitted from his return.

STATEMENT OF FACTS

The issues here seem to be principally legal and not factual. Appellant's "Statement of the Case" (Appellant's Brief pp. 2-3-4) contains only two references to *Transcript of Record*. Many of the assertions therein, specifically, could and can be substantiated by reference to the *Transcript of Record*. That many of those assertions can not be substantiated, to the best of our recollection, by reference to *Transcript of Record*, seems not so important as is the fact that the "Statement of the Case," above mentioned, is principally exculpatory to the Appellant. It seems, in great measure, that the general tenor of the "Statement of the Case" is contradicted by the verdict of the jury, "... guilty as charged in Count II of the indictment. . . ." (T.R. *pp. 16, 17). For this court's convenience the

*Transcript of Record, C. A. #14266.

following Statement of Facts, with references to *Transcript of Record*, are submitted as proving the *corpus delicti* of Appellant-Defendant's *Attempted Income Tax Evasion*, a violation of *Title 26, United States Code, Section 145(b)* on his tax year 1948; and as proving a *prima facie* case of attempted evasion for the tax year 1947.

Appellant had maintained two sets of records of receipts (T.R. p. 161) for his tax years 1947 and 1948. One set of records reflected receipts of less than one-half that which was shown by the second set (T.R. pp. 171, 174). The agent, Mr. Jack G. Williams, testified that he determined that the receipts reported for the year 1947 were those shown by the first set of records (Exhibit 11; T.R. p. 178); and that for the year 1948 he could not definitely determine that the first set of records was the basis for the receipts reported on the return but that in his opinion such appeared to be true (T.R. pp. 180, 181).

Appellee called seven witnesses who testified as to specific items of unreported income: Witnesses: Bayless (T.R. p. 135, *et seq.*), Chisholm: Gnau: Meluzzo: Ransom: Dodge: Zumstein. Bayless, a representative of the Industrial Commission testified that the agency had paid a total of twenty checks to the defendant during the year 1948. (T.R. p. 135, *et seq.*). The agent testified that of those twenty payments only four were recorded in the first set of books and eleven were entered in the second set of books. Six of the payments were not entered in either record (T.R. pp. 163, 165). Similarly, the agent testified that of the payments to defendant Bloch made by witnesses Zumstein, Dodge, Ransom, and Chisholm—a total of nine payments—none were recorded in the first record book, which was used in computing the reported income (T.R. pp. 166 through 169).

Based upon such testimony that the defendant had not recorded such a large proportion of receipts and had not taken them into account on his income tax return; and because the defendant had maintained two sets of records of receipts, one of which was used in computing his reported income and the other reflecting receipts of at least twice as much in amount; the Appellee was entitled to disregard the records as being unreliable, and to compute income by an indirect method, i.e.; bank deposit basis.

For the year 1948, the receipts from medical practice as computed on the bank deposit basis was \$16,220.55 (T.R. p. 190), as compared with receipts of \$17,728.44 reflected by the second set of records (T.R. p. 174), and the medical receipts actually reported of \$10,909.08 (T.R. p. 190). Similarly, the agent testified as to the tax deficiency that would result for the year 1948, if the second set of records were used in the computation, and such tax deficiency was even greater than that which resulted from the use of the bank deposit method (T.R. pp.203, 190).

Wilfulness was established by the testimony of several witnesses and by certain documentary evidence. The concurrent keeping of two records of receipts, widely varying in total amounts (T.R. pp. 62 through 70): Summary sheets used by the Appellant in computing his reported income were altered by him apparently, in a clumsy attempt to conceal change of amounts in units of even hundreds (T.R. pp. 176, 177). Appellant, during the investigation, first denied to the agent that he had any knowledge of the existence of the second set of records (T.R. p. 199) and denied that he had ever seen them before. Later, after being shown that many of the entries in the second set of records were his (T.R. p. 200, Appellant changed his story and stated that there was in fact a second set of records and

if he had used the wrong set in computing his income, it was merely a mistake (T.R. p. 201). The fact that Appellant admitted that real estate which he actually owned was held in the names of relatives so that he could defeat his creditors (T.R. pp. 194, 195) seems indicative of the Appellant's state of mind.

Appellant's specification No. III asserts error by reason of conflicting verdicts upon "... substantially the same facts ..." and specification No. I asserts error in refusing Appellant's requested instruction No. 2 on "wilfulness." May we point out additional evidence of "wilfulness" in connection with Appellant's tax year 1948, which did not refer to tax year 1947 (this is not mentioned as inclusive of all additional evidence as to 1948), as follows:

Witness Daniel Mooney received information to make up Appellant's income tax return for the year 1947 (T.R. pp. 108, 111, 112), in March of 1948. This information he believed to be inadequate, and probable understatement was referred to Appellant (T.R. pp. 108, 109), who gave additional information that made up a loss of "five or six thousand dollars, at least." (T.R. p. 109). (c.f. Government's Exhibit #1.) This return was filed March 15, 1948. Appellant had made an estimate of his income for 1948 and either then, or subsequently in said year, made prepayments aggregating \$300.00 on said estimate (T.R. p. 39). Appellant then hired another person to consolidate his records, of receipts and disbursements, for rendering income tax returns for his tax year 1948 (T.R. p. 230); Helen Zimberg, a member of his family (T.R. pp. 250, 251), whose lack of education (T.R. p. 251) is apparent in *Transcript of Record* and must have been known, then, to Appellant (T.R. p. 251). When the 1948 income tax return was filed, Appellant paid \$9.00

(in addition to prepayment on estimate for said year) (T.R. p. 39, c.f. Exhibit #2), and he paid an aggregate of only \$17.00 more for 1948 than he had for 1947 (T.R. pp. 39, 40).

ISSUES ON APPEAL

(References to Transcript of Record relied upon by Appellee)

1. Appellee urges that Honorable District Court's instructions on "wilfulness" are proper; that the Trial Court did not err in refusal to give Appellant's requested instruction No. 2: Appellee relies upon, and the court's instructions on wilfulness are contained in, *Transcript of Record, pages 409, 410, 411 and 415*: Appellant's requested instruction No. 2, which was refused by the court, is contained on *pages 18 and 19 of Transcript of Record*; and Appellee urges that said instruction is not a proper statement of law.

2. Appellee urges that Appellant received a fair trial: Appellee urges that no improper nor prejudicial evidence was admitted against Appellant: Appellee relies upon *pages 222, 223, 224, 292, 293, 294, 295, 300 through 310, and pages 376 through 386 of Transcript of Record*: Appellee urges that no motion for mistrial was warranted nor made (*Ibid.*): Appellee urges that no instruction to disregard allegedly irrelevant questions tending toward the pre-judicial was requested (*Ibid.*), but that the court, upon his own volition, gave such instructions as, in the context and the atmosphere of the courtroom, he felt necessary to prevent prejudice (*Ibid.*).

3. Appellee urges specification of error No. III, alleging that "The jury brought in conflicting verdicts based on what were substantially the same fact situa-

tions in Counts I and II of the indictment. . .” does not constitute error.

4. Appellee urges that no error was committed by the Honorable Trial Court in the trial of the matter now on appeal, and that particularly no reversible error was committed.

Appellee relies upon the pages of *Transcript of Record* referred to above in the numbered paragraphs, to resist this appeal, and for the convenience of the court, upon the references to *Transcript of Record* in the *Statement of Facts*, above set forth, as proof of the *corpus delicti* upon which this case was tried and conviction had.

APPELLEE’S ARGUMENT ON SPECIFICATION I

Proposition of Law No. 1: Requested charges of defendant which were erroneous or misleading or if given would have unduly burdened the charge with unnecessary and confusing details, were properly refused.

Appellant’s requested instruction No. 2, (T.R. pp. 18, 19) is not a faithful reproduction of the charge given in *Gaunt v. United States, infra*. It will be noted that the last part of the last sentence of the instruction as given in that case, *infra, at page 291*, has been deleted. It seems notable that the above *Proposition of Law No. 1* is an exact reproduction of syllabus No. 11, *Criminal Law, Wests Key No. 830*, from the same case.

Gaunt v. United States, U.S.C.A. 1st Cir., July, 1950, 184 Fed. 2d 284 (Please see pp. 286 and 291)

Furthermore, the *Gaunt case* is not in point with the case at bar. Assuming, for the moment, however, that it is in point, even then Appellant’s requested instruc-

tion No. 2 is not the instruction that was given in the *Gaunt case*. The excision of the last part of the last sentence of the instruction in the *Gaunt case*, we submit, makes the requested instruction an erroneous statement of law. This, we submit, is by reason that it infers that a "failure to secure a lawyer or accountant" is a defense in any income tax evasion case; this is by reason of the appearance of the word "... certainly"

Within the proposition of law, first above stated, therefore, the requested instruction is an erroneous statement of law: More particularly the requested instruction is a "misleading" statement: even more particularly the giving of such instructions would have burdened the charge with "... unnecessary and confusing detail ..."; Bureau of Internal Revenue Regulations were not involved; errors of law were not involved; the instruction is not appropriate to the facts that had been proved at the trial.

Timell v. United States, U.S.C.A. 9th Cir., May, 1925, 5 Fed. 2d 901

c.f. U.S. v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, cert. denied, 291 U.S. 662

It was not error to refuse to give defendant's requested instruction No. 2.

Proposition of Law No. 2: Where instructions to the jury fully and fairly inform the jury that "wilfulness" is an essential part of the proof of the crime alleged, and that "wilfulness" is to be distinguished from "mistakeness", or "carelessness", and that an act to be done "wilfully" must be an act that is done with a "bad purpose", then a jury is properly instructed upon the element of "wilfulness" for the purpose of a trial for attempted income tax evasion under *Section 145(b) of the Internal Revenue Code*.

We know of no case which holds to the contrary of the above proposition of law. For the court's convenience we cite a few cases which are directed to this particular question.

United States v. Murdock, cert. to the 7th Cir., October term, 1933, 290 U.S. 389

United States v. McCormick, U.S.C.A. 2nd Cir., December, 1933, 67 Fed. 2d 867, at p. 870

Sullivan v. United States, U.S.C.A. 9th Cir., February, 1935, 75 Fed. 2d 622

For comparison:

United States v. Norris, U.S.C.A. 2nd Cir., April, 1953, 205 Fed. 2d 828

For the court's convenience the following extracts from the Honorable Trial Court's instructions, in the case at bar, from pages 407 through 420 of *Transcript of Record*, are set out below:

1. "... You must be convinced both that a tax was due and owing in addition to that declared by the defendant, and that the defendant wilfully attempted to evade and defeat such tax. . ."
(T.R. 409)
2. "... The gist of the crime consists in wilfully attempting to escape the tax. The attempt to evade and defeat the tax must be a wilful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which it was the duty of the defendant to pay to the Government.

The attempt must be wilful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant."

(T.R. 409, 410).

3. "... The Government must not only prove that defendant did some act which tended to conceal

his true tax liability, but must also prove that this was done wilfully.

Wilfully in the statute, which makes a wilful attempt to evade taxes a crime, refers to (479) the state of mind in which the act of evasion was done.

It includes several states of mind, any one of which may be the wilfulness to make up the crime. Wilfulness includes doing an act with a bad purpose.

It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for whether or not one has the right so to act."

(T.R. 410)

4. "... In making your decision as to whether or not the acts tending to evade tax liability were wilful, you may consider all of the circumstances of the case."

(T. R. 411)

5. "... Under the indictment in this case the accusation is made that the defendant acted wilfully, that is, with a bad purpose, and not merely mistakenly or carelessly.

Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government."

(T.R. 415)

It is submitted that the giving of the above instructions on the subject matter "wilfulness", in the case at bar, constituted neither an error in omission nor an error in commission.

APPELLEE'S ARGUMENT ON
SPECIFICATION II

Appellee does not reproach those who have the expectation that government counsel be like Caesar's wife; nor claim credit that trial court's record, in the instant case, is without blemish; nor does Appellee seek to make excuses; nor seek to justify, on appeal, by references to matters outside the record. May we point out, however, that government counsel could not, before the jury, make excuses, nor justify by references to matters not within the record, nor seek to supplement the record.

Appellant claims the questions called for irrelevant evidence (Appellant's Brief, page 9). We submit, the questions asked were relevant:

For example:

(1) The Appellant put his character into evidence; he did this by testifying, and particularly, to mention one facet only, by testifying as follows:

"...Q. Now, did you set up a skating rink in Sunny-slope?

A. Yes, I did.

Q. Where did you set that up?

A. At the time I was president of the Junior Chamber of Commerce, we had a juvenile delinquency problem, and after getting together in various meetings, we found that the only way to curb that problem was to put up a skating rink, which was done in other communities.

Q. Did the Junior Chamber of Commerce of Sunny-slope have the money to build this rink?

A. No, they didn't.

Q. Did you do this as a part of a project for the Junior Chamber of Commerce?

A. Yes, I did.

Q. Did you use your own money in setting this rink up?

A. Yes, I did.

Q. Was the use of the rink restricted to the juvenile group there?

A. That is right. It was not restricted to them, but it helped curb the problem we sought to alleviate.

Q. Was this intended as a profit venture on your part? (351)

A. No, it was not.

Q. Did it actually turn out as a profit venture?

A. No. We closed it down. It is closed now, and I took a loss on it. . . ."

(Transcript of Record, page 309)

The Honorable Trial Court's rulings, and very definite instructions to the jury to disregard questions set out by Appellant, were for the purpose of preventing possible prejudice, and were not because the evidence would have been irrelevant.

(2) Appellant also put into issue the question of his expenditures, endeavoring to justify the expenditures during his tax years 1947 and 1948, as being within his income as reported in Government's Exhibits 1 and 2 (plus certain loans) (T.R. pp. 222, 223, 224, and 300 through 304 and 329 through 335).

Mr. Church: With the permission of counsel for the prosecution, if there will be no objection to taking this information out of line, once it is (243) prepared, I would like to ask permission to have that computed on that basis. Would that be all right?

Mr. Thurtle: Yes.

Q. (By Mr. Church): Then would you mind doing the same thing for 1948?

A. In other words - - -

Q. If you had allowed the \$4,000 that Dr. Bloch contends that he secured from his parents. You said that he told you he had received \$4,000, and you took half of that, is that correct, to be fair?

(*Transcript of Record, page 223*)

and:

Q. Would it put you to too much trouble to compute that on the basis of the \$4,000?

A. You would like me to compute it on the basis of \$4,000 allowed for each year?

Q. Yes, that is right.

A. Sure, I would be glad to compute it for you.

(*Transcript of Record, page 225*)

c.f. Transcript of Record, pp. 300 through 304

The questions concerning the expenditures, so seriously viewed as irrelevant, were in fact relevant; they were not required to be answered because the court was concerned that they might lead to prejudice.

Likewise, the other questions, in the context of each thereof, refers to either: "... failure to report fees ..." (top line page 383 T.R.), or to prior statements of Appellant made under oath. It is to be recalled that Appellant's character, including that for veracity, was in issue. The questions were relevant; they were just also dangerous. And the court prevented damage or blemish, upon the record, from that danger. Any explanation or showing by government counsel, in front of the jury, was impossible. (*c.f. Argument on Specification III, Proposition of Law No. 7, infra.*)

Proposition of Law No. 3: Declaration of mistrial is largely within the discretion of the trial court.

Not claiming any unusual scope to the above Proposition of Law, as it may apply to the case at bar, Appellee cites only two general cases.

Holmgren v. United States, October term, 1909, 217 U.S. 509, at p. 521

Malatkoski and Seigel v. United States, U.S.C.A. 1st Cir., January, 1950, 179 Fed. 2d 905, at pp. 912, 913, 914.

Proposition of Law No. 4: Where no motion for mistrial is made, and defendant does not request justification of questions, after questionable interrogation on cross-examination of witness who has testified to defendant's good character, and trial court sustains objection and instructs jury to disregard questions, no error is committed, and mistrial or a new trial is not warranted.

Again, not claiming any unusual scope to the above Proposition of Law, as it applies to the case at bar, may Appellee cite only a few cases:

Nichelson v. United States, October term, 1948, 335 U.S. 469

Massenberg v. United States, U.S.C.A. 4th Cir., April, 1927, 19 Fed. 2d 62

c. f. *Gaunt v. United States*, *supra*

A salutary reason for both the Proposition of Law above numbered 3, and the Proposition of Law above numbered 4, is that the most immediate opportunity for the appreciation of an irregularity or irregularities at trial is in the trial judge who observed them, in their context, and in the atmosphere of the courtroom. Likewise, if Appellant, who also observed, that occurrence which is now urged as an irregularity or irregularities,

in its context in the courtroom, had appreciated any particular or unusual affect from the occurrence, he should have and would have made a motion for mistrial. Appellant's failure then to move for a mistrial and now exploring an alleged unusual affect from the occurrence, seems a little like—eating the cake—and—having it too—but, what seems more important is that he did not give the Honorable Trial Court an opportunity to consider his secret weapon, the possibility of an unusual affect, or prejudice, from the occurrence.

We hesitate to take up the court's time with an analysis of each of the cases cited by Appellant. Appellee hopes to understand each of them, and to convey a true understanding that each of them is not in point, with the case at bar, and that none of them is of compelling force in the consideration of the case at bar.

Upon these general principles Appellee urges that the Honorable Trial Court committed no error in his treatment of questions directed to Appellant, on cross-examination, and to the other named witness, which have been taken out of context and placed in the "box score" in Appellant's brief.

Proposition of Law No. 5: In criminal case upon charge of attempted income tax evasion, where bank deposit and expenditure method of proving unreported income is justified, and where defendant takes the stand to testify, putting his character in issue, and where he and other witnesses testify to his good character, and where defendant seeks to prove bank deposits and expenditures were from money loaned to him, it is not prejudicial to cross examine defendant upon the amounts of his expenditures to ladies who are living with him and it is not prejudicial to cross examine him upon his good character.

This general principle does not seem to be questioned. It is restated as follows:

“Section 58. Same: Prosecution may Rebut. After a defendant has attempted to show his good character in his own aid *prosecution may in rebuttal* offer as evidence his bad character. The true reason for this seems to be, not any relaxation of the principle just mentioned, i.e., not a permission to show the defendant's bad character, but a liberty to refute his claim that he has a good one. Otherwise a defendant, secure from refutations, would have too clear a license unscrupulously to impose a false character upon the tribunal. . . .”

Wigmore on Evidence, 3rd Edition, 1940, Vol. 1, Sec. 58

The questions were relevant. The evidence sought might have been admitted within the confines of a fair trial. It was sought as proof of omitted income; as impeachment of the claim of good character of defendant; as impeachment of his claim of endeavoring to work for the good of juveniles; impeachment of his explanation of investment and expenditures within his reported income.

The Trial Court, in his earnest effort to afford defendant a fair trial, excluded the evidence, and in the presence of the jury criticized the questions and counsel. The defendant was afforded most ample consideration and protection.

We do not understand that this constitutes error.

APPELLEE'S ARGUMENT ON SPECIFICATION III

Proposition of Law No. 6: “Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.”

The above Proposition of Law is quoted from the following case decided in the United States Supreme Court, in October term, 1931:

Dunn v. United States, 284 U.S. 390, at p. 393

We believe that this still is the law, and wish to point out to the court that, different from the case at bar, in the *Dunn case* the different verdicts were assumed to have been found upon the *same* evidence:

“The most that can be said in such cases is that the verdict shows that either in the acquittal or conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant’s guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.”

Dunn v. United States, *Ibid.*

c.f. *Steckler v. United States*, U.S.C.A. 2nd Cir., April, 1925, 7 Fed. 2d 59, at p. 60

c.f. *Sullivan v. United States*, *supra*

It is submitted that any inconsistency that is to be found in the verdict is not legal cause for the granting of a new trial. It is submitted that there was no error in the refusal of the trial court to grant a new trial.

Proposition of Law No. 7: “Recommendation of leniency” appended by jury to a verdict of guilty does not constitute grounds for mistrial nor the granting of a motion for new trial.

We respectfully submit that in the face of what appears to be ample evidence of attempted income tax evasion, the fact that the jury appended the words, “recommend leniency” to the verdict does not necessarily evidence a prejudice against the defendant. Appealing considerations seem to indicate the converse.

Dunn v. United States, op. cit., supra

Sullivan v. United States, supra

It is submitted that the court did not err in not granting a mistrial upon his own volition, nor did he err in refusing to grant motion for new trial.

CONCLUSION

It is submitted that the evidence of attempted income tax evasion, as to Appellant's tax year 1948, was abundant; it is submitted that the evidence of income tax evasion for 1947 was extensive; it is submitted that the Appellant was given every consideration and protection, by the trial court in the trial of this case. Appellee urges that no error was committed in the trial of the case, and that more particularly, in view of the ample evidence of guilt, no reversible error was committed.

Respectfully submitted,

JACK D. H. HAYS
*United States Attorney
for the District of Arizona*

ROBERT S. MURLLESS
Assistant U. S. Attorney

*Attorneys for Appellee
204 U. S. Court House
Phoenix, Arizona*

No. 14266

**In the United States Court of Appeals
for the Ninth Circuit**

BERNARD BLOCH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

PETITION OF THE APPELLEE FOR REHEARING

H. BRIAN HOLLAND,
Assistant Attorney General.

**ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,**

Special Assistants to the Attorney General.

JACK D. H. HAYS,
United States Attorney.

FILED

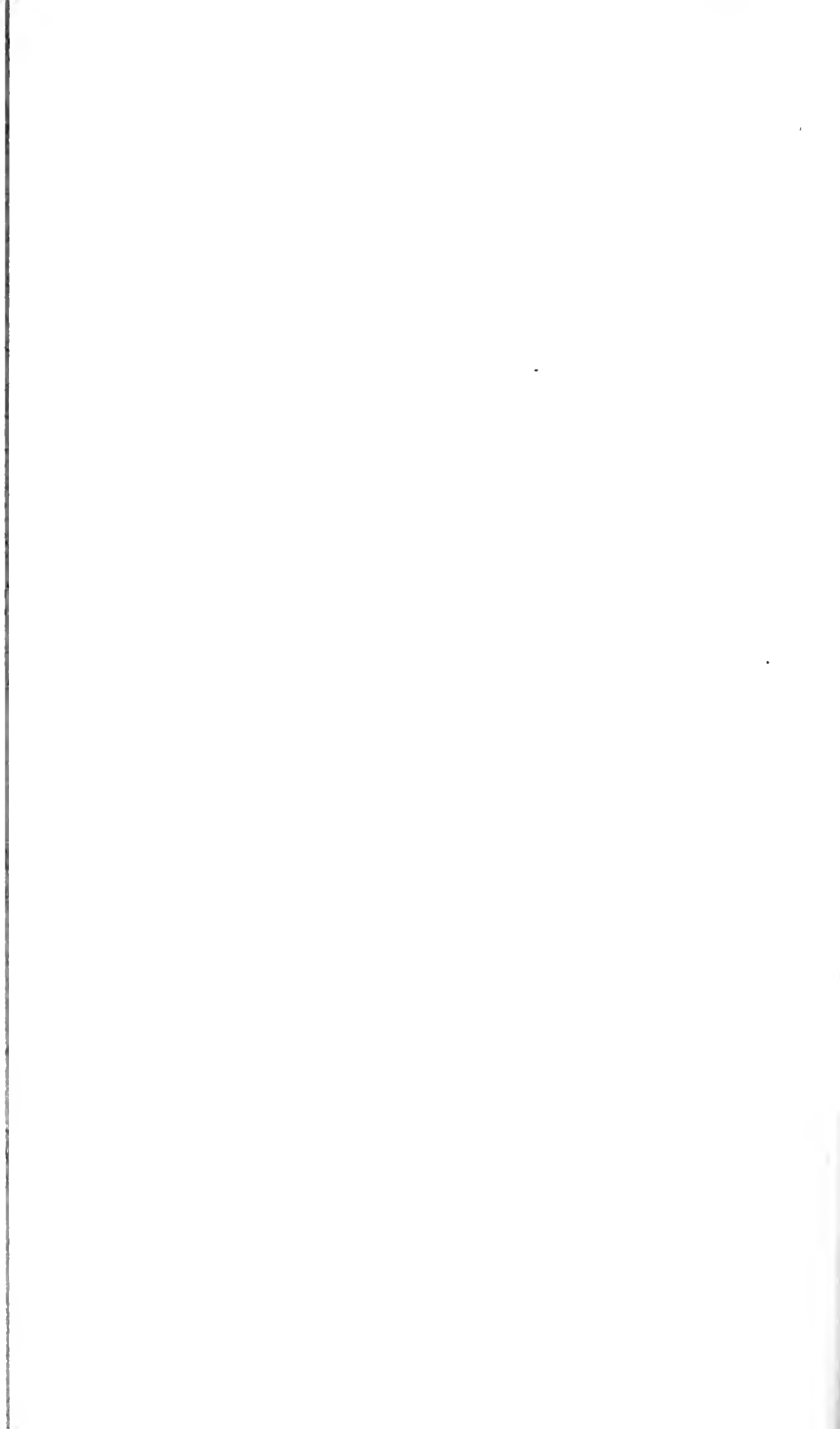
MAY 10 1955

PAUL P. O'BRIEN, CLERK

INDEX

CITATIONS

Cases:	Page
<i>Alford v. United States</i> , 282 U. S. 687.....	4
<i>Bateman v. United States</i> , 212 F. 2d 61.....	5, 7, 10, 15, 17
<i>Benatar v. United States</i> , 209 F. 2d 734, certiorari denied, 347 U. S. 974.....	17
<i>Ewing v. United States</i> , 135 F. 2d 633, certiorari denied, 318 U. S. 776.....	4
<i>Felton v. United States</i> , 96 U. S. 697.....	14
<i>Friedberg v. United States</i> , 207 F. 2d 777, affirmed, 348 U. S. 142.....	13
<i>Gordon v. United States</i> , 202 F. 2d 596, certiorari denied, 345 U. S. 998.....	10, 17
<i>Grayson v. United States</i> , 107 F. 2d 367.....	8
<i>Haigler v. United States</i> , 172 F. 2d 986.....	8
<i>Himmelfarb v. United States</i> , 175 F. 2d 924.....	15
<i>Hubbard v. United States</i> , 79 F. 2d 850.....	8
<i>Kobey v. United States</i> , 208 F. 2d 583.....	17
<i>Kroger Grocery & Baking Co. v. Stewart</i> , 164 F. 2d 841.....	4
<i>Lash v. United States</i> , decided April 7, 1955.....	17
<i>Majestic v. Louisville & N. R. Co.</i> , 147 F. 2d 621.....	4
<i>McFee v. United States</i> , 206 F. 2d 872.....	7
<i>Michelson v. United States</i> , 335 U. S. 469.....	5
<i>Mitchell v. United States</i> , 213 F. 2d 951, certiorari denied, 348 U. S. 912.....	17
<i>Morissette v. United States</i> , 342 U. S. 246.....	7
<i>O'Connor v. United States</i> , 175 F. 2d 477.....	16, 17
<i>Spies v. United States</i> , 317 U. S. 492.....	12
<i>United States v. Bowcott</i> , 170 F. 2d 173.....	4
<i>United States v. Murdock</i> , 290 U. S. 389.....	11, 12
<i>Walder v. United States</i> , 347 U. S. 62.....	4
<i>Wardlaw v. United States</i> , 203 F. 2d 884.....	7
Statute:	
Internal Revenue Code of 1939, Sec. 145 (26 U. S. C. 1952 ed., Sec. 145).....	12, 14
Miscellaneous:	
Rules of the United States Court of Appeals for the Ninth Circuit, Rule 18.....	2
III Wigmore on Evidence (3d ed.):	
Sec. 891.....	4
Secs. 948, 949.....	4



In the United States Court of Appeals for the Ninth Circuit

No. 14266

BERNARD BLOCH, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF ARIZONA*

PETITION OF THE APPELLEE FOR REHEARING

The United States of America, appellee, respectfully requests that a rehearing be afforded in the above-entitled cause. In making this request, appellee seeks not affirmance of the conviction but modification of the Court's opinion of April 11, 1955.

The Court based its judgment of reversal on the finding that two of the trial court's instructions on "willfulness," given without objection by appellant at trial or even specification as error on appeal, constituted plain error affecting substantial rights. The Court also noted its disapproval of certain cross-examination by the Government prosecutor but did not find it necessary to decide whether this questioning amounted to prejudicial error because of its previous holding in respect to the instruction points.

The Government agrees with the correctness of the Court's reversal of the conviction but does so on the sole ground that reversal is warranted by the prejudicial error resulting from the prosecutor's cross-examination of appellant concerning (1) performance of illegal operations, (2) reporting of fees received from such operations, (3) indulgence in illicit relations with one Irene Crocker, and (4) denial of a medical license. Appellee respectfully insists, however, that there was no error in the trial court's instructions on intent and certainly no fundamental error therein. Accordingly, it is urged that the Court's judgment should stand but its reasoning in support thereof should be modified.

The Court has premised its judgment herein entirely on issues not previously raised by either party to this proceeding. A rehearing in the cause would therefore be highly appropriate in order to provide opportunity to supply the Court briefs and argument on those issues, hitherto untreated, that have now assumed determinative importance. Such a procedure would conform to the apparent objectives of Rule 18 (2) (d), Rules of the United States Court of Appeals for the Ninth Circuit. See, e. g., *Gordon v. United States*, 202 F. 2d 596, certiorari denied, 345 U. S. 998.

1. Although expressing its disapproval, the Court did not decide whether certain questions asked appellant on cross-examination concerning (a) performance of illegal operations (R. 382), (b) reporting of fees from illegal operations (R. 383), (c) illicit relations with named women (R. 380, 383) and (d)

refusal of a license to practice medicine (R. 384) constituted prejudicial error. In the same vein, the Court noted but did not pass on the prejudicial effect of questions asked the witness, Miss or Mrs. Nona Jokela (R. 128, 284), on cross-examination regarding cohabitation with appellant (R. 293-294) and trips made with him (R. 294). This examination occurred "before appellant ever took the stand" (Op. 7). These two distinct lines of questioning are discussed herein in reverse order.

The Government respectfully asserts that the questions put to the witness, Jokela, were proper cross-examination, *not* as attempts to elicit evidence bearing on *appellant's character*, but as relating to the issue of Jokela's credibility as a witness, more particularly to the question of her *bias* in appellant's favor. In evaluating the propriety of the questioning under consideration, it is important to note that the witness, under examination by appellant's counsel, had previously assumed full responsibility for initiating the record-keeping system employed by appellant (R. 128) and for the recording and handling of all patient fees (R. 130-132, 291-292). Appellant later testified to precisely the same effect. (R. 312-314.) The reporting of such fees for tax purposes was, of course, a principal issue of contention in the prosecution. The thrust of Jokela's testimony was entirely exculpatory of the appellant and therefore furnished adequate basis for cross-examination calculated to show bias occasioned by the witness' relationship to him. Questions concerning traveling (R. 294), residence (R. 293-294), and even cohabitation (R. 380) with ap-

pellant were proper subjects of cross-examination of both Jokela and appellant, not to show the bad character of either of them, but to show testimonial bias of the former. *Alford v. United States*, 282 U. S. 687, 692, 693-694; *Majestic v. Louisville & N. R. Co.*, 147 F. 2d 621, 627 (C. A. 6th); *Ewing v. United States*, 135 F. 2d 633, 638, 640 (C. A. D. C.), certiorari denied, 318 U. S. 776; *Kroger Grocery & Baking Co. v. Stewart*, 164 F. 2d 841, 844 (C. A. 8th); III Wigmore on Evidence (3d ed.), Secs. 948, 949.

On direct examination, appellant testified as to his concern with the problem of juvenile delinquency extant in his community and as to his personal efforts and substantial financial contribution directed to the alleviation of this problem. (R. 309-310.) Whether this self-glorifying line of testimony was relevant or material is open to question. But appellant's credibility in this respect was a proper predicate for cross-examination concerning whether he had experienced sexual relations with a particular juvenile. (R. 383.) *Walder v. United States*, 347 U. S. 62; *United States v. Bowcott*, 170 F. 2d 173, 176-177 (C. A. 7th); III Wigmore on Evidence (3d ed.), Sec. 891. To this extent the Government's cross-examination would not appear to have been erroneous and certainly not prejudicially erroneous.

The Government concedes, however, that the balance of the questions concerning (1) illegal operations by the appellant (R. 382), (2) the reporting of fees from such operations (R. 383), (3) his illicit relations with one Irene Crocker (R. 383), and (4) the refusal of a medical license to appellant (R. 384) were prej-

udicial. The prosecutor obviously asked these questions in the good faith belief that appellant's testimony concerning his past-presidency of the Junior Chamber of Commerce (R. 308-309), his construction of a skating rink to curb juvenile delinquency (R. 309-310), and his free medical services to indigent Mexicans (R. 310-312) had placed his character in issue. This Court correctly held that such testimony did not inject the defense of good character. (Op. 7.) No character evidence in the "reputation" sense of the word was offered. *Michelson v. United States*, 335 U. S. 469, 476-477. And absent such character evidence, "the state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime." *Id.* p. 475. On this basis, the Government agrees that the reversal of the appellant's conviction is proper.

2. The trial court's instructions on "willfulness" were not error. In any event, those instructions did not constitute plain error. *Bateman v. United States*, 212 F. 2d 61 (C. A. 9th).

In the course of its careful and comprehensive charge, the court, in six distinct instances,¹ instructed

¹ "There are various schemes, subterfuges, and devices that may be resorted to to evade or defeat the tax. The one alleged in this indictment is that of filing false and fraudulent returns with the intent to defeat the tax or liability. The gist of the crime consists in wilfully attempting to escape the tax." (R. 409.)

"The attempt to evade and defeat the tax must be a willful attempt, that is to say, it must be made with the intent to keep from the Government a tax imposed by the income tax laws, which

the jury that to convict they must find that appellant intended to evade the payment of his income tax. Situated among those instructions was the following sentence (R. 410):

The presumption is that a person intends the natural consequences of his acts, and the natural inference would be if a person consciously, knowingly, and intentionally did not set up his income, and thereby the Government was cheated or defrauded of taxes, that he intended to defeat the tax.

The Court has noticed this sentence as fundamental error affecting substantial rights because the trial court told the jury, in effect, "that they could draw the conclusion that the appellant had intended to defeat or evade the payment of his tax from the mere fact that he filed an incorrect income tax return." (Op. 5.) The Government respectfully submits that this characterization of the instruction in question

it was the duty of the defendant to pay to the Government." (R. 410.)

"The attempt must be willful, that is, intentionally done with the intent that the government is to be defrauded of the income tax due from the defendant." (R. 410.)

"It is sufficient if you find beyond a reasonable doubt that the defendant received a substantial part of the income which he is charged with receiving and that he wilfully and intentionally attempted to evade or defeat a substantial portion of the taxes alleged to have been due in the indictment." (R. 412.)

"If you find that a fraudulent return was filed, with intent to defeat a part or all of the tax due, and this was done wilfully, the crime is complete as soon as the filing takes place." (R. 413.)

"Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government." (R. 415.)

completely denies effect to the words "consciously, knowingly, and intentionally." If given effect, these words effectively preclude the construction that the Court has suggested. This Court has, itself, recently rejected such a construction. In *McFee v. United States*, 206 F. 2d 872 (C. A. 9th), the identical instruction was given (McFee R. 419) and not deemed plain error or error at all. In *Bateman v. United States*, *supra*, considering essentially the same question with which we are dealing here, this Court said (pp. 69-70):

Appellants argue that the giving of the phrase, "the law presumes that every man intends the natural and probable consequences of his own voluntary acts," in effect instructed the jury that from the mere act of filing an incorrect return it may be presumed that appellants intended to evade their taxes. This is not the ground upon which the instruction was objected to in the trial court. Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U. S. C. A., failure to except to an instruction on the ground urged on appeal forecloses review of the question. *Berenbeim v. United States*, 10 Cir., 1947, 164 F. 2d 679.

Although we would be justified in placing our determination of this question on the failure of appellants to comply with Rule 30, we deem it advisable to point out that the trial court correctly instructed on the element of intent.

The cases of *Wardlaw v. United States*, 203 F. 2d 884 (C. A. 5th), and *Morissette v. United States*, 342 U. S. 246, cited at page 4 of the Court's opinion, do

not support this Court's conclusion in respect to the instruction under consideration.

In both *Wardlaw* and *Morissette*, the rulings of the trial court had the effect of creating a conclusive presumption of felonious intent and removed from the jury's consideration the defense of bona fide mistake.² In direct contrast, the jury here was charged (R. 415):

In order to convict him, you must first find beyond a reasonable doubt that he did so fail to report taxable income as charged, and that such failure was willful and intentional. The criminal law does not punish innocent mistakes, inadvertent errors, or mere negligence.

Under the indictment in this case the accusation is made that the defendant acted wilfully, that is, with a bad purpose, and not merely mistakenly or carelessly.

Before finding him guilty, you must be satisfied from the evidence that any omissions on his part were made wilfully, and with intent to evade and defeat taxes due for the calendar years 1947 and 1948 to the Government.

In *Wardlaw* and *Morissette*, the point was preserved in the record by proper objection. No such objection was made here. (R. 420.)

The Court in *Wardlaw* (203 F. 2d, p. 887, fn. 5) recognized, by its reference to *Grayson v. United States*, 107 F. 2d 367, 370 (C. A. 8th), that the giving of the instruction with which we are here concerned does not of itself constitute a denial of justice. In

² The same is true of *Haigler v. United States*, 172 F. 2d 986 (C. A. 10th), and *Hubbard v. United States*, 79 F. 2d 850, 852-853 (C. A. 9th).

the *Grayson* case, *supra*, involving a prosecution under the Mann Act, the Court of Appeals held a similar instruction not to be prejudicial, since it clearly appeared from a consideration of the charge as a whole that the jury were told to determine the issue of felonious intent from the evidence as a whole. The Court of Appeals said (p. 370):

The use of the words "presume" or "presumption" in this connection is not to be approved. No doubt *inferences* as to intent may be gathered from subsequent acts and conduct, but no *presumption* of law follows to invade and restrict the province of the jury. However, we do not think the language employed had that effect in the instant case. The question of the particular intent was not treated as a question of law, but as a matter to be submitted to and resolved by the jury. The charge as a whole must be considered. In this same paragraph the jurors are admonished that they would be justified in finding the intent only from all the evidence in the case. * * * [Emphasis supplied.]

We submit that a consideration of the charge and of the proceedings as a whole in the case at bar will satisfy this Court that no conclusive *presumption* of intent was imposed upon the jury. There were no expressions by the trial judge, such as there were in *Wardlaw* and *Morissette*, to indicate that the plea of honest mistake was no defense. On the contrary, the trial judge clearly left it to the jury to determine the presence or absence of willful intent from all the evidence, and the sentence in question, in its proper

context, simply told the jury that intent to evade was one possible *inference* which they might draw from appellant's failure to report all his taxable income.³

The trial court instructed specifically that the question of appellant's intent was for the jury to determine from "all of the facts and circumstances shown by the evidence." (R. 410-411.) Moreover, as previously noted, the court repeatedly charged the jury that "willfulness" within the meaning of Section 145 (b) meant intentional evasion of an additional tax owing (R. 409, 410, 412, 413) and specifically charged that mistake, carelessness, inadvertency or negligence did not constitute the intent requisite to conviction (R. 415). *Bateman v. United States, supra*, p. 70.

Considered in context, it is apparent that the instruction in question did not operate to withdraw the issue of intent from the jury or in any way inhibit their due consideration of the issue. The Government respectfully submits, therefore, that the instruction given was not error. By no stretch of reasoning can the instruction be considered plain error. Accordingly, appellant's total failure of objection to it forecloses consideration of the question by this Court. Rule 30, Federal Rules of Criminal Procedure. *Bateman v. United States, supra*, p. 70; *Gordon v. United States, supra*.

3. The court in *Wardlaw v. United States, supra*, after noting its disapproval of the instruction given, as previously discussed, set forth the following as a

³ Whereas the *Wardlaw* instruction was, "* * * the natural presumption would be * * *" the instruction in the instant case was: "* * * the natural inference would be * * *." (R. 410.)

guide to proper instruction on the issue of intent in a tax fraud case (p. 887) :

The intent involved in this offense is not inherent in the act itself, but is a specific intent *involving bad purpose* and evil motive and *that* specific intent must be proved by or clearly inferred from the evidence. [Citing *United States v. Murdock*, 290 U. S. 389.] [Emphasis supplied.]

In the case at bar the jury was instructed (R. 410) :

Willfully in the statute, which makes a willful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the willfulness to make up the crime.

Willfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful. It also includes doing an act with careless disregard for whether or not one has the right so to act.

In ascribing basis for reversal to the above instruction, it appears that this Court now considers plain error precisely that which the court in *Wardlaw* held essential to a proper charge on the question of willfulness. More important, the court's holding in this respect is at absolute variance with consistent precedent in this Circuit.

According to the Government's understanding, the Court reached its conclusion on the following reasoning :

In *Murdock* the Supreme Court was called upon to decide whether a willful refusal to supply information meant merely a voluntary or intentional refusal, as the trial court had charged, or whether it meant something more. In holding that in a criminal statute the term did mean something more than knowing or non-accidental, the Court advanced five wholly generic definitions, each supported by authority, among which were included those definitions used by the trial court in the instant case. Having done this, the Court separately defined “willfully” as meaning an act done with “evil motive.” This definition was taken from *Felton v. United States*, 96 U. S. 697, 702, the same case from which the Court had taken “bad purpose,” the first of the five generic definitions enumerated. The fact that in its ultimate holding in *Murdock* the Supreme Court used the terms “bad faith” or “evil motive” rather than “bad purpose” or “without justifiable excuse” is a distinction without difference. The sundry alternative definitions of willfulness presented by the Supreme Court in its opinion in *Murdock* were not idle obiter but were clearly intended as relevant to the decision reached and were obviously applied, in substance, in reaching that decision.

On page 6 of its opinion this Court says:

In this Section 145 (b) tax evasion case there is only one state of mind that will supply the intent necessary to sustain a conviction, and that is the intent to defeat or evade the payment of the tax due. Nor would filing a false return with any bad purpose supply the necessary intent. The bad purpose must be to evade

or defeat the payment of the income tax that is due. Nor would filing a false return without a justifiable excuse or without ground for believing it to be lawful or with a careless disregard for whether or not one has the right so to do constitute in themselves the intent which is required under the section. * * *

However correct these observations may be, they do not fit the facts of this case. They ignore the fact that, as previously indicated, on six separate occasions the jury was told that the intent requisite to conviction entailed an intentional evasion of an outstanding tax liability. Here the jury was not told, singularly, that under the offense charged, willfully meant filing a false return with a "bad purpose" or "without justifiable excuse." Rather, these descriptive terms of mental state were given the jury within a total framework of instruction permeated with the principle that, to be found guilty, appellant must have intended to evade his true tax liability. The instruction in question should not be isolated from the charge as a whole. *Bateman v. United States*, *supra*, p. 70. If considered in context the instruction is not error.

In *Himmelfarb v. United States*, 175 F. 2d 924 (C. A. 9th), the trial court had charged (*Himmelfarb* R. 1578-1579):

The word "wilfully" as used in the indictment and throughout these instructions simply means an intentional, conscious doing of the act prohibited, that is, intending the result which actually came to pass without ground for believing that it was lawful, or conduct marked

by a careless disregard as to whether it is lawful or not, or deliberate unwillingness to discover and obey the law. Or, to express it another way, it means an act done with a bad purpose or with an evil motive to accomplish what the statute prohibits, without regard to what the law provides. * * *

In the *Himmelfarb* case, *supra*, this Court said in affirming the conviction (p. 951):

The jury was fully instructed on requirements of proof, the element of wilfulness and the statute charged to have been violated.

This Court has previously approved an instruction almost the same, verbatim, as that here involved. In *O'Connor v. United States*, 175 F. 2d 477 (C. A. 9th), the instruction on intent was (Appellant's Br. 126-127):

“Wilful” in the statute which makes a wilful attempt to evade taxes a crime, refers to the state of mind in which the act of evasion was done. It includes several states of mind, any one of which may be the wilfulness necessary to make up the crime. Wilfulness includes doing an act with a bad purpose. It includes doing an act without a justifiable excuse. It includes doing an act without ground for believing that the act is lawful, and it also includes doing an act with careless disregard for whether or not one has the right to so act.

In *O'Connor v. United States*, *supra*, this Court affirmed the conviction stating (p. 479):

The Court's instructions were full and fair and no objections were made to them when given as required by Rule 30 * * *.

In view of the foregoing, particularly the decisions of the Supreme Court and this Court, it is clear that there was no error in the trial court's charge on willfulness. Certainly there was no plain error therein. There having been no objection at trial to the court's instructions on that issue and no specification of them as error on appeal, they cannot serve as basis for reversal of the conviction. *Mitchell v. United States*, 213 F. 2d 951, 957 (C. A. 9th), certiorari denied, 348 U. S. 912; *Benatar v. United States*, 209 F. 2d 734, 744-745 (C. A. 9th), certiorari denied, 347 U. S. 974; *Kobey v. United States*, 208 F. 2d 583, 587-588 (C. A. 9th); *Bateman v. United States*, 212 F. 2d 61 (C. A. 9th); *O'Connor v. United States*, *supra*; *Gordon v. United States*, 202 F. 2d 596 (C. A. 9th), certiorari denied, 345 U. S. 998; and *Lash v. United States* (C. A. 1st), decided April 7, 1955 (1955 C. C. H., par. 9344).

CONCLUSION

Although the Court's judgment in this cause is correct, it is respectfully urged that the premises on which it rests are erroneous.

Wherefore, it is requested that this petition for rehearing be granted and the opinion of April 11, 1955, be appropriately modified.

Respectfully submitted.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,

Special Assistants to the Attorney General.

JACK D. H. HAYS,
United States Attorney.

MAY 1955.

CERTIFICATE OF COUNSEL

The undersigned, attorneys for the United States of America, petitioner herein, hereby certify that the foregoing petition is not presented for the purpose of delay or vexation but is, in the opinion of counsel, well founded and proper to be filed herein.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
JOHN H. MITCHELL,
FRED G. FOLSOM,
GEORGE WILLI,

Special Assistants to the Attorney General.

No. 14,266

In the
United States Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
For the District of Arizona

FILED

DEC 1 1954

WADE CHURCH

324-327 Mayer-Heard Building
Phoenix, Arizona

Attorney for Appellant

PAUL P. O'BRIEN,
CLERK

TABLE OF AUTHORITIES CITED

CASES	Pages
Aeres v. Commonwealth, 259 SW Reporter (2nd) 38.....	14
Blue Bar Taxicab v. Hudspeth, 25 Ariz. 287, 296; 216 Pac. Reporter 246, 149.....	15
Edwards v. State, 239 SW Reporter (2d) 618.....	14
Guant v. United States of America, 184 Fed. 2d 284.....	5, 8
Hash v. State, 48 Ariz. 43; 59 Pac. 2d at page 311.....	12
People v. Geibel, 208 Pac. Reporter (2) 743.....	14
People v. McCarthy, 200 Pac. Reporter (2) 69.....	14
Perroza v. Ortega, 29 Ariz. 336, at pages 344-345.....	14

STATUTES

Internal Revenue Code, Section 145(b) ; 26 U.S.C.A., Section 145(b)	2
--	---

TEXTS

Wigmore, Evidence, Section 57.....	13
------------------------------------	----

In the
United States Court of Appeals
For the Ninth Circuit

BERNARD BLOCH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Opening Brief

Appeal from the United States District Court
For the District of Arizona

JURISDICTIONAL MATTERS

On November 9, 1953 in the United States District Court for the District of Arizona, Honorable David Ling, presiding, the appellant, Bernard Bloch, was found guilty of the offense of violating Title 26, United States Code, Section 145 (b) (Income Tax Evasion), as charged in Count II of the Indictment, and at the same time was found Not Guilty on Count I of the said Indictment (T.R. 3-4). November 9, 1953 the Appellant filed a motion for a new trial (T.R. 19), which motion was denied by the Court on December 7, 1953 (T.R. 20) and on December 14th, 1954 the Court entered its judgment and commitment (T.R. 21). On December 15, 1954 the Appellant, Bernard Bloch, filed a Notice of Appeal (T.R. 22).

The District Court had jurisdiction under Title 26, United States Code, Section 145 (b) (Income Tax Evasion). This Court has jurisdiction under 28 U.S.C. Section 1291.

STATEMENT OF THE CASE

On May 28, 1953 a grand jury returned an indictment charging the appellant with violation of Section 145 (b) Internal Revenue Code; 26 U.S.C.A., Section 145 (b) in two Counts: Count I relating to the calendar year of 1947, and Count II to the calendar year 1948.

For the purposes of this appeal the facts may be summarized as follows:

The appellant filed income tax returns (Form 1040) for the calendar years 1947 and 1948. The 1947 return showed a net income for said calendar year of \$2,268.81 and the amount of tax paid on said income was \$292.00; and the 1948 return indicated a net income for that calendar year of \$2,745.90 on which a tax of \$309.00 was paid. The evidence indicated that there was professional income received during 1947 and 1948 that was not reported by the appellant.

The appellant started his professional practice in 1947. He went to a community on the outskirts of Phoenix called Sunnyslope. He was one of the first physicians to go into that area and pioneered a practice in a community that was seriously in need of medical attention, as the Phoenix doctors did not choose to make the ten-mile trip because of their own over-crowded practices. The appellant was immediately covered up with work and labored day and night to take care of the needs of his patients. He did a great deal of free work for those who could not afford medical care. He was so busy with his practice that he left the care of his records to others.

His 1947 return was compiled by one Daniel J. Mooney, a general office worker by day and an income-tax consultant

of sorts by night. He worked with figures supplied by the appellant. The appellant relied on Nona Jokela for the data on income from professional services. Miss Jokela was in complete charge of the receipts of the appellant from his medical practice and responsible for their accuracy (T.R. 131-132). She set up the original books patterned after those that were used by her former employer in Detroit (T.R. 125). The so-called books consisted of:

1. An appointment book
2. Daily Record Sheet of Receipts
3. Medical History Card

The actual summary of the receipts from the appellant's medical practice was tabulated in 1947 by Nona Jokela. The data with reference to other income and expenditures was furnished by the doctor. The government questioned the amount of professional income received as against that reported, but did not raise any question about the deductions.

The doctor-appellant's income tax return was prepared by a night-time tax consultant for the sum of \$5.00 with data furnished by the doctor and Miss Nona Jokela. The appellant simply signed the return after it was prepared and presented to him by Mr. Daniel J. Mooney. The doctor did not consult a lawyer or accountant in formulating his return.

The 1948 return was prepared in a similar fashion, with the exception of the fact that it was actually prepared by Mrs. Helen Zimberg who was working for the doctor taking care of his books, helping him with the patients, cleaning the office, cooking his meals, ironing his clothes and taking care of his skating rink which kept her busy from "morning to night!" (T.R. 229). The compiling of the figures and the actual making up of the appellant's 1948 return was left to

this young lady who had never had any experience with account books and didn't know the nature of a journal, a ledger, a cashbook, a profit and loss statement or a balance sheet (T.R. 241-242). Mrs. Zimberg prepared the 1948 return and the busy doctor signed it. The doctor did not consult a lawyer or an accountant in preparing his return.

The case was submitted to the jury and the appellant was found "Not Guilty" on Count I, and "Guilty" on Count II with the jury recommending leniency.

Other facts appear in the argument.

THE QUESTIONS INVOLVED

The questions involved on this appeal are: (1) Did the Court err in failing to give defendant's instruction No. 2? (2) Did the Court err in failing to instruct properly the jury with reference to irrelevant questions asked by the prosecution (See Table A)? (3) Did the jury bring in conflicting verdicts on what were substantially the same fact situations in Counts I and II of the indictment?

SPECIFICATION OF ERROR NO. I

The Court erred in failing to give the following instruction No. 2 which was requested by the defense (T.R. 18-19):

Defendant's Instruction No. 2

"The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145 (b) of Title 26, United States Code. I instruct you that willfully 'means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his

books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant.' ”

Guant v. U. S., 184 F.2d 284.

Certiorari denied by Supreme Court.
Refused:

/s/ DAVE W. LING, Judge.

SPECIFICATION OF ERROR NO. II

The Court erred in failing to instruct the jury properly with reference to certain questions that were asked by the prosecution. For the convenience of the Court these questions have been tabulated and set out in Table A (infra).

SPECIFICATION OF ERROR NO. III

The jury brought in conflicting verdicts based on what were substantially the same fact situations in Counts I and II of the indictment.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. I

The Court erred in refusing to give Defendant's Instruction No. 2. While a general definition of "willfully" was given by the Court in its instructions to the jury, it is submitted that the Court should have been more specific in giving a guide to the jurors in light of a decision in a similar case on "all-fours" with the factual situation in the instant case. In *Guant v. United States of America*, 184 Fed. 2d 284 (Certiorari denied by Supreme Court of the United States, January 8, 1951, 340 U.S. 939) the Court speaking through

TABLE A—BOX 30

Questioner	Questioned	Subject: Question	Question
Murless	Appellant	Sexual Intercourse	Did you ever under oath swear never had sexual intercourse with Irene Crocker? (T.R. 383)
Murless	Appellant	Sexual Intercourse	Did you testify at that time that never had sexual intercourse with girl, a juvenile, by the name of Ruff? (T.R. 383)
Murless	Appellant	Doctor's License	Have you ever been refused a license (doctor's) anywhere else (T.R. 383)
Murless	Appellant	Illegal Operations	Did you make an oath that you performed illegal operations in office? (T.R. 382)
Murless	Appellant	Illegal Operations	Did you make an oath that you failed to report fees from illegal operations? (T.R. 382) A. I never failed to report fees from illegal operations? Q. Yes. A. I never performed illegal operations.
Murless	Appellant	Mistress	Were you keeping Mrs. Jokela doctor 1947? (T.R. 380)
Thurtle	Jokela (Receptionist)	Mistress	How long have you lived with doctor? (T.R. 293)
Thurtle	Jokela (Receptionist)	Mistress	Did the doctor give you anything besides your \$100.00 and room board? A. No Sir. Did he ever give you any diamond rings? A. No, he didn't. Did he ever give you any expensive jewelry? A. No. Did he ever take you on any trips? him? A. On occasion, yes.

OBJECTIONABLE QUESTIONS

Counsel Objection	Court
For Honor I object.	Yes, what does that have to do with this case?
Object to that. What does that have to do with this case, your Honor?	Disregard that, gentlemen. It is highly improper.
For Honor, I object. That has nothing to do with this case. It is absolutely immaterial.	Yes. Disregard that, too, gentlemen. You are going to have mistrial in a minute young man, if you keep that up.
For Honor, I am going to object.	Just a minute. What does that have to do with it?
Objection.	None
Object to that question. The wording is implying that—he says, “Were you keeping Mrs. Jokela?”	Yes it isn’t necessary.
For Honor, I am objecting to this line of testimony. The defendant is presumed to have good character. There is no evidence that has been introduced of good character and therefore, any evidence which is evidence of bad character is not admissible.	There is not any evidence that she lived with the doctor. You are assuming that.
For Honor, I am going to object to this line of testimony. This is apparently immaterial, attempted evidence of bad character.	She wouldn’t have to answer that question. She can claim immunity.

Judge Woodbury said that the following charge "seems to us accurate and adequate, and eminently fair to the defendant on the issue of wilfulness":

"The indictment in this case charges a violation of a willful attempt to evade or defeat a tax imposed by Section 145 (b) of Title 26, United States Code. I instruct you that willfully 'means knowingly, and with a bad heart, and a bad intent; it means having the purpose to cheat or defraud or do a wrong in connection with a tax matter. It is not enough if all that is shown is that the defendant was stubborn or stupid, careless, negligent or grossly negligent. A defendant is not willfully evading a tax if he is careless about keeping his books. He is not willfully evading a tax if all that is shown is that he made errors of law. He is not willfully evading a tax if all that is shown is that he in good faith acted contrary to regulations laid down by the Bureau of Internal Revenue and the United States Department of Treasury. He certainly is not willful if he acts without advice of a lawyer or accountant,' for there is no requirement that a tax payer, no matter how large his income, should engage a lawyer or an accountant."

This case is good law, has been quoted in a number of subsequent cases, and is admirably suited to the facts in the instant case. This case would have served as an intelligent guide to the jury because: (1) it spelled out the meaning of "willful" in a practical manner adapted to the fact in the case; (2) it pointed out the meaning of "willful" in relation to whether the defendant was "stubborn or stupid, negligent or grossly negligent;" (3) it related the meaning of the word to carelessness in keeping books which carelessness was evident in the instant case; (4) then, too, it related the meaning of "willful" to actions of a defendant in not consulting a lawyer or an accountant which had a direct application to the case in hand. In a word, the jury

would have been afforded a practical guide in language they could understand, rather, than a technical definition that afforded them little help in arriving at the meaning of "willful."

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. II

The Court in failing to instruct the jury properly with reference to certain questions asked by the prosecution, seriously prejudiced the jury against the appellant. These questions which have been tabulated in Appellant's "Table A" show an overall persistent pattern of questioning designed to inflame and prejudice the jury against the appellant, which questions were wholly irrelevant and incompetent with reference to proof of the issues involved in this case. This case involved a *willful* and *knowing* evasion of income taxes. The fundamental element of the crime was that of willfulness, or its lack. By the greatest stretch of the imagination, the questions of whether the appellant had sexual intercourse with certain persons, whether he was denied a doctor's license in any other state, whether he performed illegal operations, or whether he kept a mistress had no bearing on this central issue of *willfulness* in evading the payment of income taxes. Yet, the prosecution insisted on getting before the jury these evidences of bad character by putting questions to the appellant and Nona Jokela, his receptionist, which they knew would receive a "no" answer. We have broken down the objectionable questions into four categories: (1) those relating to sexual intercourse; (2) refusal of a doctor's license; (3) illegal operations; and (4) mistress.

First, let us examine the questions with reference to *sexual intercourse*:

Mr. Murless to Appellant

“Q. Did you ever under oath swear you never had sexual intercourse with one Irene Crocker?” (T.R. 383)

Mr. Murless to Appellant

“Q. Did you testify at that time that you never had sexual intercourse with a girl, a juvenile, by the name of Betty Ruff?” (T.R. 383)

These questions, of course, outrage every principle of evidence. They are immaterial and irrelevant to the issues involved and tend to inflame the minds of the jury against the defendant. There is nothing wrong with sexual intercourse *per se*; however, when it is implied that it took place between the defendant (a bachelor) and one Irene Crocker, who might be married or unmarried, then, it would be an illegal act; and when it impliedly took place between the defendant and a *juvenile* named Betty Ruff, then it becomes not only illegal, but a thing abhorred.

The second objectionable question concerned implied refusal of a *doctor's license*. The question was:

Mr. Murless to Appellant

“Q. Have you ever been refused a license (doctor's) anywhere else?” (T.R. 384)

This question was asked by the prosecution with the expectation of a “no” answer, and for the purpose of leading the jury to believe that the doctor had been refused a license elsewhere and had to come to Arizona to practice. There was no evidence of a refusal elsewhere introduced by the prosecution; and further, the question was not relevant to any issues involved.

The third set of questions involved *illegal operations*. While no evidence was ever presented of any illegal operations performed by the appellant, the prosecution in order

to persuade the jury that they were dealing with a "bad guy" asked the following questions:

Murless to Appellant

"Q. Did you make an oath that you never performed illegal operations in your office?" (T.R. 382)

Murless to Appellant

"Q. Did you make an oath that you never failed to report fees from illegal operations?" (T.R. 382)

The defendant answered the latter question before an objection could be interposed.

Here, again, what bearing could unsubstantiated illegal operations have on the issues involved in a criminal income tax case? Here the purpose must have been to raise ugly implications, rather than to carry the burden of proof on the material issues.

Finally, a series of questions were asked by the prosecution to convey to the jury that Miss Nona Jokela was a *mistress* of the appellant. These questions were:

Thurtle to Jokela (Receptionist)

"Q. How long have you lived with the doctor?" (T.R. 293)

Thurtle to Jokela (Receptionist)

"Q. Did the doctor give you anything else besides your \$100 and room and board? Did he ever give you any diamond rings? Did he ever give you any expensive jewelry? Did he ever take you on any trips with him? Where did he take you?"

Again, these questions were designed to unduly prejudice the jury against the appellant and had no probative value.

All of the questions listed above and tabulated in Appellant's "Table A" seem to fit into an overall plan on the part of the prosecution to attempt to convict the appellant on the basis of other unproved acts quite apart from those upon

which the income tax case was based. Thus, the prosecution reasoned that they would have two strings to their bow, and that in the event the income tax string snapped, they would still have the "bad-guy" string intact.

It is submitted that these questions can at once be seen to be damaging to the appellant because behind each question is a form of implied warranty by the United States attorney that the facts upon which the questions were based were true. It is as though the Federal attorneys had themselves taken the stand and sworn they possessed evidence that the appellant:

1. Had sexual intercourse with Irene Crocker and Betty Ruff;
2. Had been denied a doctor's license elsewhere;
3. Had performed illegal operations; and
4. That the appellant was keeping a mistress.

These are the ideas that the prosecution was trying and succeeded in conveying to the jury, cleverly sneaking in the back door what they could not hope to get in through the front door. If the Federal attorney had facts with which he wished to impeach the appellant, then he could have been sworn like any other witness and been submitted to cross-examination, but it is wrong legally and morally for him to get before the jury knowledge that he may possess under the guise of cross-examination.

See *Hash v. State*, 48 Ariz. 43; 59 Pac. 2d at page 311.

The lower Court judge is to be commended on his valiant effort to keep the objectional insinuations from the jury by sustaining the frequent objections of counsel for the appellant. While he did not always caution the jury to disregard the question, he ruled properly in each case. However, the stubborn fact remains that the questions *did* get before the

jury in spite of the Court's rulings and did prejudice the appellant in the mind of the jury. No rulings of the Court could raise from the jury's mind the repeated impressions conveyed by the improper questioning of the prosecution.

As a general proposition in criminal law, evidence of bad character is not admissible where evidence of good character has not been put in issue. It is to be noted in the instant case that there was not any evidence of good character offered by the appellant-defendant. The reason for this exclusion is that the defendant in a criminal case may be found guilty of a crime, not because he is believed to be guilty in connection therewith, but because the evidence of bad character may be thought by the jury to deserve punishment. Further, the accused's failure to produce testimony of his good character does not warrant the inference, if allowed, would render the above proposition meaningless and of no force. This doctrine has been set forth by Professor John H. Wigmore in his treatise on *Evidence*, Section 57 and is referred to by him as "Auxiliary Policy":

"* * * Auxiliary Policy operates to exclude what is relevant—the policy of avoiding the uncontrollable and undue prejudice and possible unjust condemnation, which such evidence might induce * * *.

* * * This doctrine is and can be supported as one better calculated than the opposite to lead to just verdicts. The deep tendency of human nature to punish, not because our victim is guilty this time but because he is a bad man and may as well be condemned now that he is caught, is a tendency which cannot fail to operate with any jury, in or out of Court."

As a general proposition, this policy, then, operates to prohibit the prosecution from introducing evidence of *other criminal acts wholly apart from those with which he is charged*.

There are several state cases in point:

(1) In *Edwards v. State*, 239 SW Reporter (2d) 618 in a murder prosecution, there was evidence introduced concerning acts of *sexual intercourse* by the defendant with a prostitute. The Court held such questioning to be improper.

(2) In *People v. Geibel*, 208 Pac. Reporter (2) 743 in a prosecution for forgery, a question on cross-examination as to whether the defendant had been suspended from practicing law in the state was held to be prejudicial error.

(3) See also, *People v. McCarthy*, 200 Pac. Reporter (2) 69 where it was held that irrelevant evidence adduced by prosecution short of the crime and designed merely to degrade and prejudice defendant in the minds of the jury was held incompetent.

(4) Again, in *Acres v. Commonwealth*, 259 SW Reporter (2nd) 38, the Court on June 12, 1953 held, in a murder prosecution, that questions asked of the defendant about his association with women other than his wife were intended to smear the defendant's character and were incompetent and prejudicial.

It is immaterial whether the objections to the foregoing questions were properly sustained by the Court because once the improper questions are asked, it is almost impossible for the jury to ignore them.

In *Perroza v. Ortega*, 29 Ariz. 336, at pages 344-345, the offer of evidence which counsel must have known to be incompetent was held to be prejudicial, even though the jury was instructed to disregard it. The Court said:

"We feel, however, that the evidence must necessarily have been prejudicial in the highest degree to the defendant, and it is a well-known fact that, when evidence is once admitted before a jury, it is almost impossible for them to disregard it."

In a similar case, *Blue Bar Taxicab v. Hudspeth*, 25 Ariz. 287, 296; 216 Pac Reporter 246, 149 the Court said:

"The consequences of such information (that defendant was insured) is well known, and is sufficient to request a new trial. It is useless for counsel to talk of the innocuous character of this evidence, when they at the same time, in order to get the information before a jury, are willing to imperil any verdict which might be rendered. All lawyers know the rule in regard to such evidence, and they must not expect the Court to establish a rule, and then wink at its violation."

It is respectfully submitted, that on the basis of the foregoing objectionable questions the defendant should be granted a new trial.

ARGUMENT IN SUPPORT OF SPECIFICATION OF ERROR NO. III

The jury brought in conflicting verdicts based on what were substantially the same fact situations in Counts I and II of the indictment.

In spite of the overwhelming weight of authority to the effect that conflicting verdicts are allowed where there are two separate counts in an indictment, it is submitted that the fact situations in this indictment are out of basically similar fact situations. In Counts I and II the records were kept by the receptionists employed by the appellant; the same type of records were kept, consisting of an appointment book, a daily list of receipts, and a doctor's record card; the transcript shows that the doctor-appellant in each year following the same practices in his record keeping and filing of a return, with the exception that in 1947 a pseudo-bookkeeper assisted in the preparation of the return. It is submitted that it would be unreasonably torturing the appli-

cation of the law to the two sets of facts to arrive at a "Not Guilty" verdict on Count I and a "Guilty" verdict with a recommendation of leniency on Count II.

CONCLUSION

It is respectfully submitted that the judgment of the lower Court should be reversed.

WADE CHURCH,

324-327 Mayer-Heard Building
Phoenix, Arizona

Attorney for the Appellant

No. 14329

**In the United States Court of Appeals
for the Ninth Circuit**

RAYONIER INCORPORATED, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION**

BRIEF FOR APPELLEE

WARREN E. BURGER,
Assistant Attorney General.

CHARLES P. MORIARITY,
United States Attorney.

FRANCIS N. CUSHMAN,
Assistant United States Attorney.

**SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
SONDRA KAPLAN,**
Attorneys, Department of Justice.

FILED

OCT 1 1954

**PAUL P. O'BRIEN
CLERK**

INDEX

	Page
Jurisdictional statement	1
Statement of the case	2
Argument	6
Introductory statement	6
I. Neither Statutory Nor Common Law Liability Can be Imposed Upon The United States By Reason Of The Alleged Combustible Matter On The Railroad's Right of Way	8
A. The Port Angeles Western Railroad's Right of Way Through The Olympic National Forest Is An Easement Through Public Lands	9
B. At Common Law The Responsibility For Maintenance of an Easement Rests Solely Upon the Owner of the Dominant Estate	10
C. The Owner of the Servient Estate is Under No Statutory Dnty in Washington to Keep an Easement Free of Combustible Matter	13
II. The Allegations In The Complaint Respecting The Presence of Combustible Matter On Lands Adjoining The Right Of Way Do Not State A Cause Of Action Under The Tort Claims Act	17
A. The Washington Statutes Relied Upon By Appellant Cannot Serve as the Basis for a Claim Under the Act	17
B. An Adjoining Landowner Is Under No Common Law Duty to Guard Against the Negligent Act of a Railroad on Its Right of Way	19
C. The Allegations of Fact Do Not Indicate A Causal Relationship Between The Presence of The Combustible Matter And The Damage Complained Of	21
III. Liability May Not Not Be Imposed Upon The United States Under The Tort Claims Act For The Asserted Negligence Of The Forest Service In Fighting The Fire	23
A. The Actions of the Forest Service Personnel in Fighting This Forest Fire on Public and Private Land Were Those of Public Firemen	23
B. The Tort Claims Act Does Not Extend To Claims Grounded Upon The Assertedly Negligent Performance Of A Public Function	29
C. The United States Owed No Actionable Duty to Appellant Under Its Fire Protection Agreement With The State of Washington	39
D. The United States Breached No Duty Owing This Appellant by Reason Of Its Ownership Of The National Forest	42

Conclusion	Page 45
Appendix	47

CITATIONS

Cases:

<i>Abrams v. Seattle & M.R. Co.</i> , 27 Wash. 507, 68 Pac. 78.....	12
<i>Arneil v. Schnitzer</i> , 173 Ore. 179, 144 P. 2d 707.....	21
<i>Arnhold v. United States</i> , (No. 14331, C.A. 9).....	2
<i>Atlas Assurance Co. Ltd. v. State</i> , 102 Cal. App. 2d 789, 229 P. 2d 13	21
<i>Avey v. West Palm Beach</i> , 152 Fla. 717, 12 So. 2d 881.....	35
<i>Bellevue, City of v. Daly</i> , 14 Idaho 545, 94 Pac. 1036.....	11
<i>Bina v. Bina</i> , 213 Iowa 432, 239 N.W. 68.....	15
<i>Bowers v. East Tennessee & W. N.C.R. Co.</i> , 144 N.C. 684, 57 S.E. 453	20
<i>Brogan v. City of Philadelphia</i> , 346 Pa. 208, 29 A. 2d 671.....	36
<i>Burr v. Clark</i> , 30 Wash. 2nd 149, 190 P. 2d 769.....	22
<i>Cerri v. United States</i> , 80 F. Supp. 831 (N.D. Cal.).....	36
<i>Cunningham v. City of Seattle</i> , 40 Wash. 59, 82 Pac. 143.....	40
<i>Dalehite v. United States</i> , 346 U.S. 15, 5, 18, 19, 23, 30, 31, 32, 33, 35, 36, 38, 39, 40, 42, 43	
<i>Dempsey v. New York Central & Hudson River R. Co.</i> , 146 N.Y. 290, 40 N.E. 867	30
<i>Dorminey v. Montgomery</i> , 232 Ala. 47, 166 So. 689.....	35
<i>Feres v. United States</i> , 340 U.S. 135.....	32, 35, 36
<i>Fireman's Fund Ins. Co. v. Northern Pacific R. Co.</i> , 46 Wash. 635, 91 Pac. 13	12
<i>Glanzer v. Shepard</i> , 233 N.Y. 236, 135 N.E. 275.....	41, 42
<i>Great Northern Ry. Co. v. United States</i> , 315 U.S. 262.....	10, 13
<i>Hagerman v. City of Seattle</i> , 189 Wash. 694, 66 P. 2d 1152....	40
<i>Harris v. United States</i> , 205 F. 2d 765 (C.A. 10).....	19
<i>Hastings v. Chi. R. I. & P. Ry. Co.</i> , 148 Iowa 390, 126 N.W. 787	11
<i>Heale v. United States</i> , 207 F. 2d 414 (C.A. 3).....	19
<i>Herman v. Roberts</i> , 119 N.Y. 37, 23 N.E. 442.....	11, 15
<i>Herzog v. Grosso</i> , 41 Cal. 2d 219, 259 P. 2d 429.....	11
<i>Himonas v. Denver & R. G. W. R. Co.</i> , 179 F. 2d 171 (C.A. 9) .	10
<i>Indian Towing Company v. United States</i> , 211 F. 2d 886 (C.A. 5)	36, 38, 42
<i>Jordan v. Spokane P. & S. Ry. Co.</i> , 109 Wash. 476, 186 Pac. 875	44, 45
<i>Kleinclaus v. Marin Realty Co.</i> , 94 Cal. App. 2d 733, 211 P. 2d 582	21
<i>Labor Board v. Jones & Laughlin Co.</i> , 331 U.S. 416.....	30
<i>Lawson v. City of Seattle</i> , 6 Wash. 184, 33 Pac. 347.....	40
<i>Leroy Fibre Co. v. Chi. Mil. & St. P. Ry.</i> , 232 U.S. 340.....	20
<i>Lynch v. North Yakima</i> , 37 Wash. 657, 80 Pac. 79.....	40
<i>McKain v. B. & O. R. Co.</i> , 65 W. Va. 233, 64 S.E. 18.....	44
<i>Miralago Corp. v. Village of Kenilworth</i> , 290 Ill. App. 230, 7 N.E. 2d 602	35
<i>Moch v. Rensselaer Water Co.</i> , 247 N.Y. 160, 159 N.E. 896....	40

III

Cases—Continued

	Page
<i>Moffett v. Berlin Water Co.</i> , 81 N.H. 79, 121 Atl. 22	15
<i>National Manufacturing Co. v. United States</i> , 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967	5, 36, 37, 38, 42
<i>Neallus v. Hutchinson Amusement Co.</i> , 126 Me. 469, 139 Atl. 671	30
<i>New York C. & St. N.R. Co. v. Fieback</i> , 87 Ohio St. 254, 100 N.E. 889	30
<i>P. Dougherty Co. v. United States</i> , 97 F. Supp. 287 (D. Del.), reversed 207 F. 2d 626 (C.A. 3), certiorari denied, 347 U.S. 912	42
<i>Prince v. Chehalis Savings & Loan Association</i> , 186 Wash. 372, 58 P. 2d 290, affirmed on rehearing, 186 Wash. 377, 61 P. 2d 1374	20
<i>Reed v. Allegheny Co.</i> , 330 Pa. 300; 199 Atl. 187	11
<i>Sandberg v. Cavanaugh Timber Co.</i> , 95 Wash. 556, 164 Pac. 200	44
<i>Savage v. District of Columbia</i> , 52 A. 2d 120 (Mun. App. D.C.)	36
<i>Schatter v. Bergen</i> , 185 Wash. 375, 55 P. 2d 344	22
<i>Slaton v. Chi. M. & St. P. R.R.</i> , 97 Wash. 441, 166 Pac. 644	12
<i>Small v. Board of Council of City of Frankfort</i> , 203 Ky. 188, 261 S.W. 1111	35
<i>Somerset Seafood Co. v. United States</i> , 193 F. 2d 631 (C.A. 4)	36
<i>State v. Furth</i> , 82 Wash. 665, 144 Pac. 907	15
<i>State v. Levy</i> , 8 Wash. 2d 630, 113 P. 2d 306	16
<i>Steitz v. City of Beacon</i> , 295 N.Y. 51, 64 N.E. 2d 704	35
<i>Strauss v. Thompson</i> , 175 Kan. 98, 259 P. 2d 145	11
<i>Texas City Disaster Litigation, In re</i> , 197 F. 2d 771 (C.A. 5), affirmed <i>sub nom. Dalehite v. United States</i> , 346 U.S. 15	33
<i>Thornton v. Missouri Pacific R. Co.</i> , 42 Mo. App. 58	30
<i>United States v. Inmon</i> , 205 F. 2d 681 (C.A. 5)	19
<i>United States v. Spelur</i> , 338 U.S. 217	30
<i>Walters v. Mason County Logging Co.</i> , 139 Wash. 265, 246 Pac. 749	44
<i>Wilcox v. City of Chicago</i> , 107 Ill. 334	36

Statutes:

Act of March 3, 1891, c. 561, § 24, 26 Stat. 1103, as amended, 16 U.S.C. 471	24
Act of June 4, 1897, as amended, 30 Stat. 35, 16 U.S.C. 476	26
Act of February 1, 1905, c. 288, 33 Stat. 628	25
Act of March 3, 1905, 33 Stat. 872	25
Act of May 23, 1908, c. 792, 35 Stat. 259, 260, as amended, 16 U.S.C. 500, 553	27
Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U.S.C. 563	28
Sec. 2	28
Act of March 4, 1913, 37 Stat. 843, 16 U.S.C. 501	27
Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U.S.C. 564, 565	28

Statutes—Continued

	Page
Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946), 60 Stat. 842, as reenacted, 62 Stat. 869, 992:	
28 U.S.C. 1346	1
28 U.S.C. 1346(b)	18, 32, 47
28 U.S.C. 2674	1, 32, 37, 38, 47
28 U.S.C. 2680(a)	31, 32, 37
Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934	9
Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 35	25
New York Court of Claims Act:	
Sec. 8	35
Rev. Code Wash.:	
Sec. 424.040 (R.R.S. 5647)	48
Sec. 76.04.060	29
Sec. 76.04.070	29
Sec. 76.04.370 (R.R.S. 5807)	14, 16, 17, 18, 48
Sec. 76.04.450 (R.R.S. 5818)	14, 17, 49
Sec. 76.04.480 (R.R.S. 5821)	14
Miscellaneous:	
2 American Law of Property, § 866	11
18 A.L.R. 2nd 1081	45
18 A.L.R. 2nd 1089	45
18 A.L.R. 2nd 1090	12
18 A.L.R. 2nd 1091	45
18 A.L.R. 2nd 1097	45
42 A.L.R. 783	45
42 A.L.R. 795	45
42 A.L.R. 799	12
42 A.L.R. 812	45
42 A.L.R. 821	45
Annual Report of the Secretary of Agriculture (1951), p. 18 ..	28
Annual Report of the Secretary of Agriculture (1952), p. 18 ..	26
Budget of the United States for the fiscal year ending June 30, 1954:	
p. 402	29
p. 403	29
p. 406	29
Budget of the United States for the fiscal year ending June 30, 1955:	
p. 338	29
p. 339	29
p. 343	28, 29

Miscellaneous—Continued

	Page
43 C.F.R. (1949 ed.) 243.2	10
67 Cong. Rec. 11086-11100	31
67 Cong. Rec. 11092	31
69 Cong. Rec. 2191	31
69 Cong. Rec. 2192	31
69 Cong. Rec. 2196	31
69 Cong. Rec. 3117	31
69 Cong. Rec. 3118	31
69 Cong. Rec. 3127	31
86 Cong. Rec. 12021-12022	31
Green, <i>Rationale of Proximate Cause</i> (1927), pp. 3, 4	22
Guthrie, <i>Great Forest Fires of America</i> (U.S. Department of of Agriculture, 1936), p. 6	28
Hearings before a Subcommittee of the House Committee on Claims, 72nd Cong., 1st Sess. (Feb. 1932), p. 17	31
Hearings on H. R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16	31
Hearings on S. 2690, 76th Cong., 3rd Sess. (March 1940), pp. 27-28	31
Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2nd Sess. (Jan. 29, 1942):	
p. 28	31
p. 33	31, 32
p. 37	31
p. 38	31
p. 39	31
p. 45	31
p. 65	31
p. 66	31
<i>Highlights in Forest Conservation</i> (U.S. Department of Agri- culture Information Bulletin No. 83 (1952)), p. 9	28
H. Rept. No. 2800, 71st Cong., p. 9	31
H. Rept. No. 2428, 76th Cong., p. 3	31
H. R. 7236, 76th Cong. (86 Cong. Rec. 12021)	31
H. Rept. No. 2245, 77th Cong., p. 10	31
H. Rept. No. 1287, 79th Cong., p. 5	31
Jones on Easements (1898) § 831	11, 15
12 L.R.A. (N.S.) 624	20
23 L.R.A. (N.S.) 289	44
<i>Our National Forests</i> (U.S. Department of Agriculture Infor- mation Bulletin No. 49 (1951)):	
p. 2	25
p. 3	26
p. 4	26
p. 26	27
Prosser on Torts:	
p. 177	22
pp. 311 <i>et seq.</i>	22

Miscellaneous—Continued

	Page
S. Rept. No. 1196, 77th Cong., p. 7.....	31
S. Rept. No. 1400, 79th Cong., p. 31.....	31
Sparhawk, <i>The History of Forestry in America</i> , The Yearbook of Agriculture (U.S. Department of Agriculture, 1949):	
p. 702	24
p. 706	24
p. 709	25
<i>The Work of the U.S. Forest Service</i> (U.S. Department of Agriculture Information Bulletin No. 91 (1952):	
pp. 5-20	26
p. 12	28
p. 18	28

**In the United States Court of Appeals
for the Ninth Circuit**

No. 14329

RAYONIER INCORPORATED, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON, NORTHERN
DIVISION*

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Appellant brought this action against the United States under the provisions of the Federal Tort Claims Act¹ in the United States District Court for the Western District of Washington, Northern Division (R. 3-35). On February 27, 1954 an order dismissing the

¹The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.* While subsequently repealed, its provisions were re-enacted into law, under the revision of the Judicial Code, as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

complaint was entered in favor of the United States (R. 66-67). On March 24, 1954 notice of appeal was filed (R. 67). The jurisdiction of this Court rests upon 28 U.S.C. 1291 and 1294(1).

STATEMENT OF THE CASE

In this action, appellant seeks to recover damages against the United States for property loss allegedly sustained as a result of a forest fire in Clallam County, Washington (R. 3-35). This appeal is from a judgment dismissing the complaint (R. 66-67).²

Summary of the allegations of fact in the amended complaint. Rayonier is a Delaware corporation authorized to do business in the State of Washington (R. 3-4.) Its principal business is the manufacture of pulp and, in connection therewith, it owns extensive timber lands in the State of Washington as well as sundry facilities and equipment for use in logging operations (R. 4-5). Additionally, at the times relevant to the action, it was a party to two so-called "Timber Sales Contracts" with the Forest Service of the U. S. Department of Agriculture, under the terms of which it had the right and obligation to purchase and cut certain timber on public lands (R.5). On September 20, 1951 there remained uncut timber which appellant had the right and obligation to purchase under these contracts (R. 5).

The Olympic National Forest contains extensive timber lands, many of which are adjacent to or in the gen-

² This case involves the same series of events and presents basically the same claim as *Arnhold v. United States* which also is now pending on appeal in this Court (No. 14331). While the Government's position is virtually identical in both cases, our briefs differ in some respects; e.g., in the footnote material here, the contentions peculiar to this appellant.

and considered

eral vicinity of lands owned by Rayonier (R. 5-6). These public lands are administered by the Forest Service and a portion of the timber thereon is sold to private parties for commercial and industrial purposes (R. 6).

By agreement between the Forest Service and the State of Washington, a "Forest Service Protective Area" was established, embracing *inter alia* Rayonier's lands and the above-mentioned public domain (R. 6). The Forest Service agreed to protect the land within this area against fire and to take action in suppressing fires originating on or threatening the area (R. 6-7). Rayonier and other adjacent landowners were aware of the establishment of the Forest Service Protective Area and of the duties of the Forest Service pertaining thereto (R. 7).

The District Ranger of the Forest Service for the District in which this Forest Service Protective Area was located was one Sanford Floe. (R. 8). In the performance of their duties, Ranger Floe and his subordinates were supposed to inspect and patrol the lands within the Protective Area to discover, abate and eliminate conditions which constituted fire hazards (R. 9). Further, when a fire occurred, they were supposed to supervise, direct and control its suppression (R. 9). Ranger Floe was authorized to employ, rent and use all men, equipment, tools and materials he deemed necessary to accomplish these ends (R. 9). Additionally, Floe and his subordinates were fire wardens of the State of Washington and in such capacity they had the authority to impress help in the prevention, suppression and control of forest fires (R. 9-10).

It is further alleged that during 1951, and for several years prior thereto, the Port Angeles Western Railroad possessed a right of way across the public domain

(R. 11). The locomotives and other equipment operated by the Railroad on the right of way were defective, with the result that they emitted sparks. (R. 11). The Railroad had also permitted its right of way to become covered with inflammable matter and many of its track ties had rotted (R. 11-12). Additionally, such matter had accumulated on lands adjoining the right of way (R. 11-12). These conditions were, or should have been, known to Ranger Floe and could have been, but were not, abated by him prior to August 6, 1951 (R. 12). Floe had called to the Railroad's attention, however, its use of defective equipment and its failure to observe prescribed fire prevention practices (R. 12).

At approximately noon on August 6, 1951, sparks from a Port Angeles Western Railroad train crossing the public domain started fires on and in the vicinity of the right of way (R. 12). Shortly thereafter, Ranger Floe was notified of the fires whereupon he and his subordinates immediately assumed exclusive supervision and control of the efforts to suppress them (R. 13). Rayonier knew that this supervision had been undertaken and relied upon it being continued (R. 13-14).

Between August 7, and August 11, 1951 the fires spread over approximately 1600 acres of land (R. 15). By the latter date, it was brought under control and remained contained within the 1600 acre area until the morning of September 20, 1951 (R. 15). At that juncture, a northeasterly wind of not unusual force carried sparks and other burning matter from within the area to lands to the west and south (R. 24). New fires started and spread rapidly in various directions, destroying or damaging facilities and equipment on Rayonier's property, as well as timber on the public domain which was

covered by the Timber Sales Contracts entered into by Rayonier and the Forest Service (R. 24, 31).

It is also alleged that the spread of the fire on September 20 and the resultant damage to Rayonier's property was attributable to the negligence of Ranger Floe and his subordinates in the conduct of their fire-fighting activities (R. 29). In broad outline, this negligence consisted of the failure at various stages to dispatch and utilize sufficient amounts of the men and equipment at their disposal; the failure to maintain proper fire patrols and look-outs; the failure to take appropriate action in the light of weather conditions and weather forecasts; the failure to discover and extinguish between August 11, 1951 and September 19, 1951 all fires and burning matter in the 1600 acre area; and the failure to carry out a Fire Suppression Plan which previously had been adopted by the Supervisor of the Olympic National Forest (R. 13-19).

Proceedings in the court below. On February 19, 1954 the amended complaint was filed (R. 3-35). On February 27, 1954 the United States made an oral motion to dismiss the complaint on the grounds that it failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter (R. 48-49). After a hearing on the motion (R. 48-65), the District Court granted the motion on the former ground and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 66-67). In his oral remarks from the bench, Judge Boldt cited *Dalehite v. United States*, 346 U. S. 15 and *National Manufacturing Co. v. United States*, 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967 (R. 56-58).

Introductory Statement

The court below has held that appellant's complaint fails to state a claim upon which relief may be granted under the Tort Claims Act. That holding is correct in every respect. As will be demonstrated, neither the Act itself nor, insofar as it is applicable, the law of the State of Washington permits the imposition of liability upon the United States by reason of the asserted acts and omissions of employees of the Forest Service which form the basis of the instant claim.

In Point I below, we discuss the allegations of the complaint in respect to the purported failure of the United States to compel the Port Angeles Western Railroad to remove combustible matter from its right of way and to observe certain safety practices. For the purposes of this discussion, we can assume *arguendo* that appellant is right in suggesting that the United States, as the owner of the Olympic National Forest, may be analogized to the owner of private property and that the provisions of Washington statutes may be deemed to govern the administration of federally owned public lands. For, as will be shown, neither under these statutes nor under the common law would a private landowner be responsible for the condition or manner of use of a railroad right of way running across his property. Furthermore, the fact that the United States may have reserved the privilege of requiring the Railroad to maintain its right of way in a safe condition and to conduct its operations on that right of way in a safe manner hardly implies the existence of a legal duty to do so.

In Point II we turn to the allegations in the complaint in respect to the presence of combustible matter

on national forest land adjoining the right of way. We show in this connection that the Washington statute relied upon by appellant, which imposes absolute liability upon a landowner for the mere presence of such matter on his property whether he is responsible for its existence or not, may not serve as the basis for a claim under the Tort Claims Act. Additionally, it will be shown that the common law imposes no duty under which a property owner would be civilly liable solely by reason of the presence of combustibles on his land in circumstances where the fire causing the damage did not originate on that property, or where the damage to third persons was not proximately caused by the combustibles. In this regard, it is to be noted that the complaint here does not contain the specific allegation that the inflammable matter on the national forest was the result of activities undertaken by the United States. Nor do the allegations of fact indicate that the proximate cause of the injury to appellant's property was the purported presence of combustibles on the national forest.

In Point III will be considered the allegations concerning developments subsequent to the outbreak on August 6, 1951 of the forest fire. We shall demonstrate that the fire suppression activities were undertaken by employees of the Forest Service in their capacity as public firemen and that, as a consequence, their asserted negligence in the performance of these activities does not give rise to liability under the Tort Claims Act. Insofar as the agreement between the United States and the State of Washington calling for fire protection in the Olympic Peninsula area is concerned, that agreement merely emphasizes the public nature of the fire fighting endeavors of the Forest Service and, in any

event, does not create an actionable duty upon the part of the United States running to this appellant. Finally, the Washington statutes and judicial decisions relied upon by appellant, even if they may be considered applicable, do not support the theory that the United States, as owner of the national forest, breached a duty owing appellant by reason of the asserted negligence of the Forest Service in fighting the fire.

I

Neither Statutory Nor Common Law Liability Can Be Imposed Upon the United States by Reason of the Alleged Combustible Matter on the Railroad's Right of Way

It is not disputed that the forest fire occasioning the damage complained of was caused by the ignition of combustible material on the right of way maintained by the Port Angeles Railroad across the Olympic National Forest. It is also unchallenged that the ignition resulted from a spark from a steam locomotive owned and operated by the Railroad. Appellant urges, however, that by reason of its ownership of the national forest, the United States was charged with the responsibility of keeping the railroad right of way clear of combustible matter. From this, appellant proceeds to the conclusion that, by failing to abate the fire hazard which the Railroad created and continued in violation of both the common law and Washington statutes, the Government itself became answerable under the Tort Claims Act for the consequences of any fire resulting from the Railroad's negligent operations on the right of way.

The difficulty with this line of reasoning lies in the invalidity of the premise that the United States owed a duty to this appellant in respect to the right of way.

This is turn stems from a total misconception of the nature of the Railroad's interest in the right of way and the legal duties concomitant with that interest.

A. The Port Angeles Western Railroad's Right of Way Through The Olympic National Forest Is An Easement Through Public Lands.

The right of way possessed by the Port Angeles Western Railroad across the Olympic National Forest, in common with other rights of ways held by railroads on the public domain, was granted by the United States pursuant to the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934. This statute, which patently was designed to aid in the expansion of railroad and telegraph facilities, provides as follows:

The right of way through the public land of the United States is granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The question of the extent of the railroad's interest in a right of way granted under the Act has been considered by the Supreme Court on several occasions, most recently in *Great Northern Ry. Co. v. United States*, 315 U. S. 262. In the *Great Northern* case the Court, after a reference to the legislative history of the Act, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments, held unequivocally that railroads enjoy an easement in their rights of way on public lands. This holding was followed by this Court in *Himonas v. Denver & R. G. W. R. Co.*, 179 F. 2d 171.

The present administrative construction of the character of the grant fully accords with the judicial view. The regulations of the Department of Interior pertaining to rights of way advise railroads that while they do not possess a full and complete title to the land over which the right of way is located, they do enjoy the right to use the land for the purposes for which the grant was made and may hold possession for as long as that use continues. The regulations give further assurance that, if the Government conveys the fee simple title, the patentee will take subject to the railroad's right of use and possession. And persons settling on a tract of public land also take subject to any existing right of way. See 43 C. F. R. (1949 ed.) 243.2.

B. At Common Law the Responsibility For Maintenance of an Easement Rests Solely Upon the Owner of the Dominant Estate.

1. Since the Port Angeles Western Railroad was the

possessor of an easement as to the land upon which it maintained its right of way, the United States was under no common law obligation to maintain, repair, or otherwise keep it in good condition. It is too well settled to be open to question here that, in the absence of a contract specifying the duties and obligations of the dominant and servient owners with respect to the easement, the holder of the servient estate owes no obligation either to the dominant owner or to third parties to make repairs. Instead, the duty devolves upon, and solely upon, the owner of the easement to maintain the dominant estate and to insure that it remains in good condition. See *e.g.* *Reed v. Allegheny Co.*, 330 Pa. 300, 303, 199 Atl. 187; *Herzog v. Grosso*, 41 Cal. 2d 219, 259 P. 2d 429; *Strauss v. Thompson*, 175 Kan. 98, 259 P. 2d 145; *City of Bellevue v. Daly*, 14 Idaho 545, 549, 94 Pac. 1036; *Hastings v. Chi. R. I. & P. Ry. Co.*, 148 Iowa 390, 126 N. W. 787; *Herman v. Roberts*, 119 N. Y. 37, 23 N. E. 442. See also 2 *American Law of Property*, § 866; Jones on *Easements* (1898) § 831.³

Thus, if there is substance to the allegations in appellant's complaint regarding the condition of the right of way, it is the Railroad alone that has breached a common law duty. To maintain a right of way in proper condition is, among other things, to keep it free of fire hazards. And where the Railroad fails to do so, and a

³ As the Pennsylvania Supreme Court put it in the *Reed* case [330 Pa. at 303]:

Ordinarily [i.e., in the absence of contract] the owner of a servient estate is under no obligation to make repairs; the duty is upon the one who enjoys the easement to keep it in proper condition, and if he fails to do so and injury to third persons results, he alone is liable. [Emphasis supplied]

fire is started thereon by sparks from one of its locomotives, Washington law makes it unmistakably clear that it is liable for any damage occurring to adjoining property. This is true even if there is no negligence in equipping and operating the engine. See *e.g.* *Abrams v. Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Ins. Co. v. Northern Pacific R. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton v. C. M. & St. P. RR.*, 97 Wash. 441, 166 Pac. 644.⁴

2. That the United States may have, in its grant to the Railroad, reserved the *right* to enter upon the premises, or to require the railroad to remove combustibles from the right of way, does not affect the applicability of these principles. As the complaint tacitly concedes, the reservation did not contain an agreement by the Government to assume the Railroad's responsibility as holder of the easement to abate fire hazards and generally keep the property in good order. And, as noted above, such an agreement is an absolute condition precedent to imposing common law liability upon the servient rather than the dominant owner for injury resulting from faulty maintenance of an easement.

The motivation behind the reservation of a right of entry is not difficult to envisage. The easement hav-

⁴ The Washington rule is of course not unique. The failure to keep its right of way clear from combustible matter will in virtually every jurisdiction impose liability upon the railroad if the combustibles are ignited by sparks from a locomotive. See cases cited 18 A. L. R. 2nd 1090 *et seq.*, 42 A. L. R. 799 *et seq.* We know of no occasion where in similar circumstances liability was additionally imposed upon the possessor of the servient estate, *i.e.* the owner of the land across which the right of way is maintained.

ing been granted for the limited purpose of use as a railroad right of way, the Government must be in a position to make certain that no other and unauthorized use is being made of it. Cf. *Great Northern R. Co. v. United States, supra*.⁵ Additionally, because the failure of the Railroad to take adequate safety precautions in the operation of its trains and the maintenance of the right of way affects or endangers in the first instance the adjoining forest lands owned by the United States, the Government understandably desires, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducts its affairs on its easement.

The short of the matter is therefore that the right of entry, admittedly not coupled with an agreement to abate fire hazards or even an agreement to assume a duty of inspection of the right of way, is simply for the protection of the Government. As such, appellant cannot claim the benefit of it; nor does it disturb the force of the normal rule that third persons must look to the owner of the dominant estate if the condition or use of the estate causes harm to them.

C. The Owner of the Servient Estate is Under No Statutory Duty in Washington to Keep an Easement Free of Combustible Matter.

Because the railroad right of way crosses the Olympic National Forest, appellant additionally urges that the United States was under a statutory duty to keep the

⁵ In the *Great Northern* case, the United States sought to enjoin the railroad from drilling or removing oil, gas or minerals underlying its right of way. The Court ruled that the Great Northern's easement for railroad purposes did not confer rights to materials below the surface of the right of way.

144 Pac. 907; *State v. Levy*, 8 Wash. 2d 630, 651, 113 P. 2d 306.

Moreover, while the justification for holding a lessor of timber lands accountable for fire hazards created by his lessee is apparent, the same cannot be said with respect to the servient owner of land under railroad easement. In the first place, it is equitable as well as necessary that the lessor, who after all directly benefits through rent from the forest operations of the lessee on his land which give rise to the hazard, share in the responsibility for its elimination. Secondly, the typical lease or license agreement is one for a defined limited period of time, at the conclusion of which possession of the land reverts to the owner. Consequently, the lessor out of possession will never be confronted with the necessity of assuming *in perpetuity* the burden of policing another's activities.

This is not the situation where possession of land is taken under the grant of an easement, especially where the easement is in the nature of a railroad right of way. The dominant owner, much like the owner of a determinable fee, takes possession in perpetuity, "to have and to hold" so long as the easement is used for the purpose granted. See p. 10, *supra*. This means that the servient owner and his successors in interest, if the statute were applicable to them, would have an uninterrupted responsibility for the condition of the surface of land which in all likelihood they will never regain possession of and from which, at the same time, they stand to derive no benefit. We think that it would take much more than Section 5807 as it now stands to attribute any such intent to the legislature.

The Allegations in the Complaint Respecting the Presence of Combustible Matter on Lands Adjoining the Right of Way Do Not State a Cause of Action Under the Tort Claims Act

In addition to the allegations regarding the combustible matter on the railroad right of way, appellant's complaint asserts that there were slashings on Government lands adjoining the right of way. Again relying on Sections 5807 and 5818 of the Remington Revised Statutes, see *supra* p. 14, and upon the common law, appellant urges that the mere presence of the combustibles call for the imposition of liability upon the United States for the damage done to its property by the fire.

A. The Washington Statutes Relied Upon By Appellant Cannot Serve as the Basis for a Claim Under the Act.

There is no need to dispute that as to lands adjoining the railroad right of way, in contrast to the right of way itself, the United States is the "owner" within the meaning of Section 5807. Nor do we question that under the allegations of the complaint a private landowner in like circumstances would be susceptible to criminal prosecution irrespective of whether the fire hazard was created by affirmative acts on the part of himself or his employees, or instead was the result of the conduct of a third party—perhaps even a trespasser.

Indeed, in contrast to its predecessor, which conditioned criminal liability upon the prior receipt of of-

ficial notice of the existence of the fire hazard,⁷ Section 5807 in terms imposes absolute criminal liability on the owner of land containing such a hazard solely because of his ownership. And it is for this reason that, even assuming that the Section looks to civil liability as well, it may not be invoked as a basis for recovery under the Tort Claims Act. Under the Act, the United States has consented to be sued only “for the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment.” 28 U.S.C. 1346(b), *infra*, p. 47. Cf. p. 32, *infra*. Thus, the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault. This was expressly recognized in *Dalehite v. United States*, 346 U. S. 15, 44-45, where the Supreme Court observed:

* * * there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court’s finding that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a “negligent or wrongful act or omission” of an employee. Absolute liability, of course, arises irrespective of

⁷ Prior to its amendment in 1939, Section 5807 provided that land covered by inflammable debris “shall, if so declared by the supervisor of forestry, constitute a fire hazard * * *.” Notice of the existence of such hazard and of the requirement for its abatement had to be then transmitted in writing to the landowner and/or the person, firm, or corporation responsible for its existence.

how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. *So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity. United States v. Hull, 195 F. 2d 64, 67. [Emphasis supplied.*

And the *Dalehite* holding since has been applied by the Third, Fifth and Tenth Circuits in refusing to extend the Tort Claims Act to liability without fault situations. See *Heale v. United States*, 207 F. 2d 414 (C.A. 3); *United States v. Inmon*, 205 F. 2d 681, 684 (C.A. 5); *Harris v. United States*, 205 F. 2d 765, 767 (C.A. 10).⁸

B. *An Adjoining Landowner Is Under No Common Law Duty to Guard Against the Negligent Act of a Railroad on Its Right of Way.*

Because of the above considerations, appellant must demonstrate that under the allegations of the complaint common law liability would exist. This it cannot do.

It was long settled at common law that a landowner

⁸ The above considerations of course would be equally applicable to appellant's claim grounded upon the alleged statutory violations on the railroad right of way. It was not necessary to discuss them in that connection because, as seen, the statute does not impose liability upon a servient owner for fire hazards left on an easement by the dominant owner.

had an almost unlimited right to use his property as he saw fit. See *e.g.*, cases cited 12 L.R.A. (N.S.) 624. This meant that a property owner might store inflammable material on his land without incurring liability for the spread of a fire from adjoining land through the material onto other adjoining land. See *Bowers v. East Tennessee & W. N. C. R. Co.*, 144 N.C. 684, 57 S.E. 453. It similarly meant that a railroad which negligently had set fire to inflammable matter on neighboring property could not plead the presence of the matter as contributory negligence.

This is well illustrated by the decision of the Supreme Court in *Leroy Fibre Co. v. Chi, Mil., & St. P. Ry.*, 232 U.S. 340. There, the fibre company brought suit against the railroad to recover for the destruction of inflammable flax straw which had been stacked on the fibre company's property adjacent to the right of way and which had become ignited by a spark from a railroad locomotive. One of the questions certified to the Supreme Court was whether it was for the jury to decide if the flax straw owner was held to the exercise of reasonable care to protect the straw from a fire set by the negligence of the railroad. The Court held that it was not, observing that the fibre company was under no duty to conform its use of its own property to the possibility of wrongful acts by the railroad on the right of way.

It is quite true that in recent years the common law rule has been somewhat modified. Some jurisdictions now adhere to the view that a landowner is responsible for damage to adjoining land from a fire originating in combustibles on his property, even if the fire started as the result of a negligent act of a trespasser on the property. Thus in *Prince v. Chehalis Savings & Loan Association*, 186 Wash. 372, 58 P. 2d 290, affirmed on

rehearing, 186 Wash. 377, 61 P. 2d 1374, the owner of a garage was held liable for the spread of a fire starting in his abandoned garage in circumstances where the garage was left in a state of disrepair and was used at night by itinerants. And in *Arneil v. Schnitzer*, 173 Ore. 179, 144 P. 2d 707, the same result was obtained where owners of a sawmill allowed inflammable debris to accumulate and an itinerant, entering upon the property, discarded a lighted cigarette in the vicinity of the debris.

At the same time, however, there was no suggestion in these cases that the common law rule was to be further modified to hold the owner accountable where, as here, the acts of negligence causing ignition of the combustibles take place on an adjoining railroad right of way. And while the Washington courts have not been confronted squarely with that question, it has been considered recently in California. In that jurisdiction, a landowner remains under no duty, in the use of his property, to guard against negligence by the railroad in the operation of its trains on a right of way. See *Atlas Assurance Co. Ltd. v. State*, 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus v. Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583-584. We know of no holding in any jurisdiction to the contrary.

C. The Allegations Of Fact Do Not Indicate A Casual Relationship Between The Presence of The Combustible Matter And The Damage Complained Of.

While, in light of the foregoing, appellant's claim grounded upon the purported accumulation of slashings on the lands adjoining the right of way would fail in any event, we think it bears mentioning that the complaint does not allege facts sufficient to indi-

cate a casual relationship between the presence of the inflammable debris and the damage that was sustained by appellant. True enough, there is a sweeping conclusion that this damage was the proximate result of the myriad acts of negligence charged to the Government (R. 29). But, in advancing appellant's version of events in some detail, the complaint fails to refer to a single fact which, if true, would suggest that the purported slashings had the remotest bearing upon the spread of the forest fire onto appellant's land.⁹

It is of course basic to the law of torts that an act of abstract negligence cannot support the imposition of liability; facts must further be alleged and proved demonstrating that damage was proximately caused by the negligence. *Prosser on Torts*, p. 177, 311 *et seq*; Green, *Rationale of Proximate Cause* (1927) pp. 3, 4. "Legal" or "proximate" cause is therefore an essential element of any cause of action sounding in negligence, whether it be based on the asserted violation of a common law duty or of a statute. Nor does it matter that the statute relied on imposes absolute liability or characterizes violations as "negligence per se". In either case, liability in tort is still entirely dependent upon a showing that the harm proximately resulted from the violation. See *e.g. Schatter v. Bergen*, 185 Wash. 375, 55 P. 2d 344.

⁹ The single specific reference to the slashings on Government lands adjoining the right of way appears in paragraph XI of the complaint (R. 11-12). While it is difficult to determine whether appellant is alleging that the debris was burned during the course of the fire, there is no assertion that the debris increased the rapidity of its spread or that it would not have spread but for the presence of the slashings. Cf. *Burr v. Clark*, 30 Wash. 2d 149, 190 P. 2d 769. And, in any event, the fire was under control in a 1600 acre area for over a month before the wind caused its spread onto appellant's land (R. 15, 24).

III

Liability May Not Be Imposed Upon the United States Under the Tort Claims Act for the Asserted Negligence of the Forest Service in Fighting the Fire

For the reasons developed above, it is plain that liability may not be imposed upon the United States for the consequence of the forest fire because of the alleged presence of combustible matter upon the railroad right of way and adjoining portions of the Olympic National Forest. The remaining question is whether the Tort Claims Act may be invoked to recover damages for the asserted failure of Forest Service personnel to fight properly the fire. We now demonstrate that the answer to the question is, as the District Court held, in the negative. This follows from the fact that the actions of the Forest Service complained of were undertaken in the Service's capacity as a public fireman and, under the decision of the Supreme Court in *Dalehite v. United States*, 346 U.S. 15, claims grounded upon the performance of strictly governmental functions of this character are excluded from the coverage of the Tort Claims Act.

A. The Actions of the Forest Service Personnel in Fighting This Forest Fire on Public and Private Land Were Those of Public Firemen.

In their brief here (Br. p. 50), as in the court below, appellant attempts to characterize the fire suppression endeavors of Ranger Floe and his subordinates as merely the acts of a landowner upon whose property a fire has developed. As even a sketchy examination into the historical background and present functions of the Forest Service will reveal, however, nothing

could be farther removed from the actualities of the matter. Even if in any of the phases of its wide-spread and complex activities the Forest Service appropriately could be analogized to the caretaker of private property, in its effort to prevent and suppress fires on forest land it serves the public at large as do local fire departments maintained by cities and towns to protect the property of their residents. And the Forest Service's operations in this important field can scarcely be dismissed as incidental; as will be seen they command, and deservedly so, a large measure of attention in the continuing effort by the Service, under its Congressional mandate, to further the conservation of forest resources essential to the general welfare.

1. Following the recommendations over a period of years of leading conservationists, who believed that such a step was essential to the preservation of the nation's timber supply, Congress in 1891 authorized the President to set apart and reserve forest lands of the public domain, whether bearing commercial timber or not, in any state or territory where such land is located. Act of March 3, 1891, c. 561, § 24, 26 Stat. 1103, as amended, 16 U.S.C. 471. Almost immediately thereafter, on March 30, 1891, President Harrison exercised this authority by proclaiming the Yellowstone Park Timberland Reserve. During the balance of the Harrison administration, and the subsequent Cleveland administration, several additional reservations were made.¹⁰

In spite of its clear purposes in terms of conserva-

¹⁰ See Sparhawk, *The History of Forestry in America*, The Yearbook of Agriculture (U. S. Department of Agriculture, 1949), 702, 706.

tion, the 1891 Act made no provision for the protection and administration of the forest reserves; nor did it provide any regular method whereby the developing principles of forest management could be applied thereto. This deficiency was remedied in the Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 35, which stipulated that the Secretary of the Interior shall "make provisions for the protection against destruction by fire and depredation upon the public forests and forest reservations" and "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction". The Secretary of the Interior immediately undertook the administration and protection of the reservations, assigning the task to the then General Land Office which appointed a field force of supervisors and rangers.¹¹ The managerial responsibility remained in the Department of the Interior until 1905 when Congress transferred it to the Department of Agriculture, where it was placed in the hands of the Bureau of Forestry.¹² This Bureau, which was headed by Gifford Pinchot (one of the foremost American conservationists), became the Forest Service later in the same year and, in 1907, the forest reserves were renamed National Forests.¹³

At the time that the administration of the national forests evolved to the Forest Service, the then Secretary

¹¹ *Id.* at p. 709. See also, *Our National Forests* (U. S. Department of Agriculture Information Bulletin No. 49, (1951)) p. 2.

¹² Act of February 1, 1905, c. 288, 33 Stat. 628. See also *Our National Forests*, *supra*, n. 11, at p. 2.

¹³ *Our National Forests*, *supra*, n. 11, at p. 2. See also Act of March 3, 1905, 33 Stat. 872.

of Agriculture advised the Service in a formal communication to Chief Forester Pinchot that "it must be clearly bourne in mind that [these forests] are to be devoted to [their] most productive use for the permanent good of the whole people."¹⁴ For the past fifty years, this principle has been the Service's watchword in carrying out the duties in respect to the forests, which now are more than 150 in number and cover a total area in excess of 180 million acres.¹⁵ We cite here but a few examples. Timber management plans have been placed into effect to guide the growing and harvesting of timber crops in such a manner as will furnish "continuous supplies of timber for the people of the United States." Range resources have been controlled to assure the best possible supply of forage year after year. Forestry and farming practices designed to protect watersheds and help prevent disastrous flood conditions have been put into effect. Recreational areas have been established for the use and enjoyment of outdoor enthusiasts. And the search is continuous for methods and means of increasing further the productivity of all national forest land.¹⁶

While national forest timber is sold to private individuals, such sales are permitted only in circumstances where the cutting and removal of the timber will serve the purpose of "preserving the living and growing timber and promoting the younger growth in national forests." Act of June 4, 1897, as amended, 30 Stat. 35, 16 U.S.C. 476. Furthermore, the overall administra-

¹⁴ *Id.* at p. 4.

¹⁵ *Id.* at p. 3. See also Annual Report of the Secretary of Agriculture (1952), p. 18.

¹⁶ These and other functions of the Forest Service are described in some detail in *The Work of the U. S. Forest Service* (U. S. Department of Agriculture Information Bulletin No. 91, (1952)) pp. 5-20.

tion of the national forests produces an annual deficit for the Treasury.¹⁷ This deficit is enlarged by reason of the Congressional proviso that 25% of all moneys received from each national forest shall be paid to the state in which the forest is situated, to be expended by the state for the benefit of public schools and roads. Act of May 23, 1908, c. 792, 35 Stat. 260, as amended, 16 U.S.C. 500. And an additional 10 per cent of the receipts is available for expenditure on national-forest roads and trails in the state of origin. Act of March 4, 1913, 37 Stat. 843, 16 U.S.C. 501.

2. At the same time that the interests of conservation were being furthered through the development and expansion of the national forest system, there was an increasing awareness of the dire necessity of cooperation between federal and state governments in among other things the matter of providing protection against forest fires, *irrespective of their place of occurrence*. This awareness manifested itself first in the 1908 enactment of a statute directing the Forest Service to aid in the enforcement of the laws of the states and territories with regard to the prevention and extinguishment of forest fires. Act of May 23, 1908, c. 792, 35 Stat. 259, 16 U.S.C. 553.

Following a series of unprecedented forest fires in 1910, which burned millions of acres in Minnesota,

¹⁷ In the fiscal year 1950, for example, the Forest Service spent approximately 37 million dollars in the operation, management and protection of the national forests. National forest receipts during the same period totaled nearly 34.5 million dollars. *Our National Forests*, *supra* n. 11, at p. 26.

While this serves to bring the nature of the Government's operation of the national forest system into better perspective, as will be seen below it does not matter for the purposes of the Tort Claims Act whether the national forests are managed on a profit or non-profit basis.

Idaho, Washington, and Oregon,¹⁸ Congress decided to broaden the participation of the Forest Service in fire fighting activities. By Section 2 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U.S.C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all "the timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U.S.C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private forest lands.¹⁹ This cooperation takes several forms.²⁰ The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latter's direction of organized fire prevention and control. It conducts nationwide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements whereby it has assumed the function of undertaking the suppression of fires on *all* lands within a par-

¹⁸ See Guthrie, *Great Forest Fires of America* (U. S. Department of Agriculture 1936) p. 6; *Highlights in Forest Conservation* (U. S. Department of Agriculture Information Bulletin No. 83, (1952)) p. 9.

¹⁹ Annual Report of the Secretary of Agriculture (1951), p. 18.

²⁰ See *The Work of the U. S. Forest Service*, n. 16, *supra*, at p. 12, 18; The Budget of the United States for the fiscal year ending June 30, 1955, pp. 343.

ticular area, whether federally owned or not. As stated in appellant's complaint, such an agreement was outstanding in the area here involved and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it should be noted that in Washington, as in some other jurisdictions, these wardens have among their duties the control and suppression of forest fires throughout the forest area of the state. See Rev. Code Wash. §§ 76.04.060, 76.04.070. In this capacity, they clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.

While the statistical data relating to Forest Service fire prevention and suppression activities as above outlined cannot tell the whole story, they do give a good picture of the present magnitude of those activities. During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.²¹ The figures for the preceding year are no less impressive.²²

B. The Tort Claims Act Does Not Extend to Claims Grounded Upon The Assertedly Negligent Performance Of A Public Function.

It is clear from the foregoing that appellant's claim is grounded upon the assertedly negligent performance by the Forest Service of its long-standing and firmly

²¹ Budget n. 20, *supra*, pp. 338, 339, 343.

²² See Budget for the fiscal year ending June 30, 1954, pp. 402, 403, 406.

rooted public function in connection with the prevention and suppression of forest fires. Even appellant's complaint stresses that this function was here undertaken not as owner of the national forest but rather in the stead of the state forest fire fighting service and with regard to both public and private lands. The question thus comes down, in the final analysis, to whether the Tort Claims Act permits the imposition of liability upon the United States for the performance of exclusively public activities which do not have a private counterpart.²³ The legislative history of the Act, its express terms, and the decisions of the Supreme Court construing it, indicate beyond doubt that the answer is in the negative.

The Tort Claims Act was passed by the 79th Congress in 1946 as Title IV of the Legislative Reorganization Act—the culmination of “some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.” (*United States v. Spelar*, 338 U.S. 217, 219-220). Throughout this period, as the Supreme Court observed in *Dalehite v. United States*, 346 U.S. 15, 28, the prime legislative effort was to make the United States amenable to suit

²³ That private persons may serve on occasion as state forest wardens by agreement with the State of Washington does not mean that they act in a private capacity or that there is a private counterpart to the activities of the Forest Service here. As the Supreme Court noted in *Labor Board v. Jones & Laughlin Co.*, 331 U. S. 416, 429, when a private individual is performing a public function under authority from the state he acts as a public officer and assumes all of the powers and liabilities attaching thereto. See also *Thornton v. Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey v. New York Central & Hudson River R. Co.*, 146 N. Y. 290, 40 N. E. 867; *New York C. & St. N. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N. E. 889; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671.

for automobile accidents—an example constantly repeated throughout the legislative history—and similar “ordinary” “common law” torts, and that purpose was expressly reaffirmed when the Act was passed.²⁴ During the same period, it was also the consistent view of Congress that the doors should not be opened to claims based upon acts of a “governmental nature” or, as stated by a member of the House Committee on the Judiciary, to “that class of tort on the part of the Government which has to do with a governmental function, to to speak.”²⁵

This purpose, that liability was not to be imposed for United States activities undertaken in a special governmental context, was carried out in large measure by the exception in 28 U.S.C. 2680(a) of claims based upon acts or omissions in the exercise of a statute or regulation, or based upon the exercise or performance or the failure to perform a discretionary func-

²⁴ See e.g., 67 Cong. Rec. 11092, 11100; 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H. R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27-8; Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942), pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rep. No. 1400, 79th Cong., p. 31.

²⁵ Representative Gwynne speaking on H. R. 7236, 76th Cong. (86 Cong. Rec. 12021). See also 67 Cong. Rec. 11086-11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021-2; Hearings on H. R. 5373 and H. R. 6463, 77th Cong. (Jan. 1942), pp. 28, 33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

The Supreme Court summarized the legislative history in the *Dalehite* case in these terms [346 U. S. at 28]: “[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function.”

tion or duty. Cf. *Dalehite v. United States, supra*, at 30-36.²⁶ But it was also carried out through the vehicle of 28 U.S.C. 2674, read in conjunction with 28 U.S.C. 1346(b). Section 1346(b) confers jurisdiction upon the district court over claims based on the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Section 2674 provides that the assumed liability is only “in the same manner *and to the same extent* as a private individual under like circumstances.” (Emphasis supplied). See p. 47 *infra*.

If at any time there existed serious doubt that these latter Sections by their terms condition recovery under the Act upon the existence of a parallel private liability, and thereby preclude the possibility of the imposition of liability for the negligent performance of an activity which is uniquely governmental in nature, it was wholly dispelled by the decisions of the Supreme Court in *Feres v. United States*, 340 U.S. 135, and *Dalehite v. United States, supra*. In the *Feres* case, the Court held squarely that the Act waives the prior im-

²⁶ The 2680(a) exception was “intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, *and the only ground for suit is the contention that the same conduct by a private individual would be tortious.*” Statement by Assistant Attorney General Shea, Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess. on H. R. 5373 and H. R. 6463, p. 33, quoted in the *Dalehite* opinion, 346 U. S. at 30 (Emphasis supplied).

munity from suit only as to "recognized causes of action" and "does not visit the Government with novel and unprecedented liabilities" (340 U.S. at 142) and that, as a consequence, recovery will be denied in cases in which "plaintiffs can point to no liability of a 'private individual' even remotely analogous to that which they are asserting against the United States" (340 U.S. at 141).

These principles were applied with specific reference to public firefighting activities in the *Dalehite* case. There, the claim was made that the Coast Guard had negligently performed its general public duty to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City and the district court, rendering judgment against the United States, specifically found in this regard that the Coast Guard had been negligent "in failing * * * promptly and quickly" to "discover the fire on the *Grandcamp* * * * to use proper and efficient efforts to extinguish such fire on the *Grandcamp*," in "failing to remove the *Grandcamp* * * * [and the *Highflyer*] from the Texas City Harbor after fire was discovered thereon and before such explosion thereon," and in failing "to extinguish and prevent the spread of the fires in Texas City." The Court of Appeals reversed but, in doing so, did not discuss the merits of these findings. *In re Texas City Disaster Litigation*, 197 F. 2d 771 (C.A. 5). In its view of the case the degree of care that the Coast Guard exercised was of no consequence in light of the requirement that an analogous private liability be present.

The Supreme Court, in affirming the determination that the circumstances of the Texas City explosion did not impose liability upon the United States, took a sim-

ilar position in regard to the negligence charged to the Coast Guard. The Court said [346 U.S. at 43-47]:

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

“. . . the liability assumed by the Government here is that created by ‘all the circumstances’, not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.” *Feres v. United States*, 340 U.S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to “the same manner and to the same extent as a private individual under like circumstances.” 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact, *if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire.* This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations assume no liability for personal injuries resulting

from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no [sic] analogy in general tort law, did not adopt a different rule. See *Steitz v. City of Beacon*, 295 N. Y. 51. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease. (Emphasis supplied) ²⁷

²⁷ While the dissenting justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the Coast Guard aspect of the case. All had joined in the opinion in the *Feres* case on which the majority relied in holding that the Coast Guard was immune from liability under the Tort Claims Act (346 U.S. at 43-44); indeed, the *Feres* opinion was written by Mr. Justice Jackson, the author of the dissent in *Dalehite*. Instead, the dissenting justices found the circumstances surrounding the manufacture and shipping of the FGAN to afford a basis for imposing liability. And, in doing so, they laid emphasis on the fact that activity of this nature has a private counterpart.

The reference in the majority opinion to *Steitz v. City of Beacon* is especially meaningful because that case arose under Section 8 of the New York Court of Claims Act which subjects the state and its subdivisions to the same liability as individuals or corporations for the same acts. The New York Court of Appeals held that this waiver of immunity did not encompass a claim based upon the negligent operation by the city of its waterworks system. The court's rationale was that the city charter provisions by virtue of which the system was established were not designed to protect the personal interest of any particular individual but rather were designed to secure the benefit of well ordered municipal government enjoyed by all as members of the community. And it is the same rationale, whether expressed in precisely those terms or not, that underlies the innumerable other decisions holding that municipalities are not liable for the negligent performance of a public service. See *e.g. Dorminey v. Montgomery*, 232 Ala. 47, 166 So. 689 (negligent maintenance of traffic control devices); *Avey v. West Palm Beach*, 152 Fla. 717, 12 So. 2d 881 (same); *Small v. Board of Council of City of Frankfort*, 203 Ky. 188, 261 S. W. 1111 (insufficient fire hose); *Miralago Corp. v. Village of Kenilworth*, 290 Ill. App. 230, 7 N. E. 2d 602 (shutting off water);

Thus the *Dalehite* decision presents the final and authoritative word in regard to the imposition of liability under the Tort Claims Act for negligence of the kind alleged here.²⁸ And it is to be noted in passing that the rationale of the decision has since been employed to strike down claims grounded upon the assertedly negligent performance of other uniquely public duties. *Indian Towing Company v. United States*, 211 F. 2d 886, (C.A. 5) and *National Manufacturing Co. v. United States*, 210 F. 2d 263 (C.A. 8) certiorari denied, 347 U.S. 967.

The claim in the *Indian Towing* case was based upon the asserted negligence of the Coast Guard in the maintenance of an aid to marine navigation and the district court dismissed the complaint on the authority of *Dalehite*. On the plaintiff's appeal, the Government observed that in maintaining navigational aids, as in fighting fires, the Coast Guard acts in the interest of the general public welfare. From this, it was urged that no analogous private liability could be found and that, as a consequence, the judgment should be affirmed. In a brief *per curiam* opinion, the Fifth Circuit agreed, stating simply that *Feres* and *Dalehite*

Brogan v. City of Philadelphia, 346 Pa. 208, 29 A. 2d 671 (failure to provide adequate police protection); *Savage v. District of Columbia*, 52 A. 2d 120 (Mun. App. D.C.) (same); *Wilcox v. City of Chicago*, 107 Ill. 334 (negligence in controlling a fire).

²⁸ Appellant's attack on the propriety of the *Dalehite* decision (Br. p. 46-49), needs no response. Nor need we discuss the reference (Br. p. 48) to *Somerset Seafood Co. v. United States*, 193 F. 2d 631 (C.A. 4) and to *Cerri v. United States*, 80 F. Supp. 831 (N.D. Cal.). To the extent that these cases, which were decided prior to *Dalehite*, suggest that liability may be imposed upon the United States for the conduct of an exclusively public activity they are no longer sound law.

were controlling and that “under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.”

In the *National Manufacturing Co.* case, the claim rested on the asserted negligence of government employees in the dissemination of weather and flood information respecting the disastrous overflow of the Kansas River in July 1951, the plaintiff pointing to several commercial weather forecasting services (*e.g.* Western Union) as providing the requisite private analogy. The district court granted summary judgment to the United States and the Eighth Circuit affirmed. While placing its decision on several alternative grounds, the court gave express recognition to the fact that the suggested comparison between the Weather Bureau and private forecasting agencies was wholly inapposite and that Sections 2674 and 2680(a), as interpreted by the Supreme Court, barred the claim. It said [210 F. 2d at 277]:

When the two sections are read in relation, as they must be, it becomes clear that Congress intended to prohibit imposition of liability upon the United States for activities undertaken by the United States in circumstances that are not like but differ in essential character from those in which any comparable private enterprises are carried on. “The Act did not create new causes of action where none existed before.” If the activity is purely governmental there can be no liability under the Act which by its terms is conditioned on the liability of a private individual in like circumstances.

It is insisted, and we agree, that the information service on flood forecasts which the Weather Bureau is authorized to establish and maintain is a mere incident of the continuing government struggle to control the flooding of the rivers and minimize flood damage. The service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is dissociated from any private business counterpart and *is closely analogous to the action all governments must take against common enemies, foreign and domestic or against plagues and epidemics and against conflagrations * * **. [Emphasis supplied.] ²⁹

²⁹ Throughout appellant's brief there are references to the alleged fact that the Government owns and manages the timber lands of the national forest in a "proprietary" capacity. These references indicate that appellant completely misunderstands the Government's position as the meaning of 28 U. S. C. 2674, which position was accepted by the Supreme Court in *Dalehite* and then applied in *Indian Towing* and *National Manufacturing*. We have never suggested that Section 2674 was intended to import the governmental-proprietary dichotomy familiar in the area of municipal liability in tort. On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle, irrespective of whether that vehicle was being employed in connection with what, in the case of a municipality, would be deemed a governmental or proprietary function. What we have urged instead is that where a traditionally public function is involved, and where the asserted negligence is in the performance of the function *itself*, Section 2674 prohibits the imposition of liability.

Translated into the terms of the instant case, appellant's claim is barred because it rests on the asserted failure of the Forest Service to extinguish properly the forest fire, the fighting of forest fires being one of the very duties the Forest Service performs (unlike private persons) for the benefit of the public at large. Had the claim rested on damages suffered as the result of a collision between a Forest Service vehicle engaged in fighting the fire, how-

C. The United States Owed No Actionable Duty To Appellant Under Its Fire Protection Agreement With The State of Washington.

In an endeavor to avoid the impact of the *Dalehite* decision, appellant contends that the cooperative fire protection agreement between the Forest Service and the State of Washington placed a specific duty in the Government owed to each property owner in the area, for the breach of which liability may be imposed upon the United States. This contention is wholly without merit.

As appellant is compelled to concede, the Forest Service, by virtue of the agreement in question, simply undertook certain public responsibilities normally resting upon Washington state forest wardens; *i.e.* the suppression of fires on the forest lands covered by the agreement. And it perforce follows, even in the absence of the prohibition in *Dalehite* against imposing liability for the performance of public firefighting duties, that at the very most the liability of the Government to third persons in the performance of these transferred public responsibilities will be that of the state had the latter itself retained the responsibility of suppressing fires in the area and acted as the Forest Service did here. Stated otherwise, appellant scarcely can expect that, by taking over a state function, the Forest Service assumes greater potential liability than the state assumes when it performs the function.

ever, it would not have been so barred. In such circumstances the failure to perform the governmental function of fire suppression would not have been involved. Indeed, from the standpoint of such a claimant, whether the public duty to suppress the fire had been carried out or not would have been of no consequence whatsoever.

The relevant inquiry on this aspect of the case, therefore, is into the extent of the liability of the State of Washington in circumstances where its forest wardens fail to exercise properly their statutory duty (see p. 29 *supra*) to suppress fires developing in forest areas. Appellant fails to point to anything suggesting that there would be any liability whatsoever. And the fact of the matter is that Washington has long followed the universally accepted rule referred to by the Supreme Court in *Dalehite* to the effect that the activities of public firemen are conducted for the benefit of the public at large and as such do not create private actionable rights. See *e.g.* *Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79; *Cunningham v. City of Seattle*, 40 Wash. 59, 82 Pac. 143; *Lawson v. City of Seattle*, 6 Wash. 184, 33 Pac. 347. See also *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P. 2d 1152, 1156.³⁰

It is interesting to compare appellant's position here with that of the plaintiffs in the landmark case of *Moch v. Rensselaer Water Co.*, 247 N.Y. 160, 159 N.E. 896 wherein, because of its relation to fire protection, the assertedly negligent performance of a commercial service under contract with a municipality was held not to give rise to liability to private citizens. There, the defendant water company had entered into a contract

³⁰ As the court said in the *Lynch* case [80 Pac. at 80]:

[I]t may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function. . . . the services of [the fire department] are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions.

This statement was subsequently approved by the Court in the *Hagerman* case.

with the city of Rensselaer to supply water to, *inter alia*, private homes and the city's fire hydrants. While the contract was in force, a warehouse close to Moch's property caught fire. The water company was notified of the fire but allegedly failed "to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached [Moch's warehouse]". Moch then brought suit against the water company both in contract and in tort, relying on the provisions of the contract between the water company and the city. The trial court denied a motion to dismiss the complaint. The Appellate Division of the Supreme Court of New York reversed and its determination was then affirmed by the New York Court of Appeals. Judge Cardozo, speaking for a unanimous court, observed that no actionable duty rests upon a city to supply its inhabitants with protection against fire. As a consequence, a member of the public could not maintain an action by reason of the water company's contract to supply water for fire hydrants, unless the contract showed that the water company had expressly agreed to be answerable to individual members of the public in spite of the fact that the city itself would not have been so answerable [159 N.E. at 896]. Judge Cardozo went on to point out, in respect to the action in tort, that the so-called "good samaritan" rule, previously laid down by him in *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275, 276, was not applicable, adding that [159 N.E. at 898, 899]:

The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might poten-

Government would be liable to third persons in similar circumstances. Put in other terms, appellant must show that, if the national forest were privately owned and the extinguishment of a fire developing thereon was undertaken by the public firefighting body in the area (be it the Forest Service or the state forest wardens), the landowner would be held responsible for the acts or omissions of the fireman in the course of the undertaking.

Appellant cites no authority that will support the novel proposition that a private individual can be held answerable to others for the manner in which public officers and employees carry out their responsibilities to the public at large. And, insofar as we have been able to discover, there is none. On the contrary, it is an established principle that an employer is not even liable for the wrongful acts of his own employees when such acts are done in the capacity of a public officer (*e.g.* special policeman) rather than primarily in their capacity as servant, *McKain v. B. & O. R. Co.*, 65 W. Va. 233, 64 S. E. 18; and see cases in Note, 23 L.R.A. (N. S.) 289. Cf. n. 23, *supra*, p. 30.

2. Assuming *arguendo* that a private person in any circumstances would be liable for the spread of a fire from his land to adjoining lands due to the negligence of a public fireman, he would not be so liable in the circumstances of this case. For, the Washington Supreme Court in delineating the landowner's statutory and common law duty respecting fires *not set by him* has emphasized continually that it arises only in situations where the fire *originates* on his own property. See *e.g.* *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200; *Jordan v. Spokane P & S. Ry Co.*, 109 Wash. 476, 186 Pac. 875; *Walters v. Mason County*

Logging Co., 139 Wash. 265, 246 Pac. 749. And those other jurisdictions in which a landowner has any duty at all where the fire was not started by him place the same limitation. See *e.g.*, cases cited 42 A. L. R. 783, 821 *et seq*; 18 A. L. R. 2d 1081, 1097.

We have considered in another connection some of the principal reasons why a right of way granted to a railroad is, for the purposes of the statutory and common law obligations resting upon the owner of land, the property of the railroad. See *supra*, pp. 10-16. While we do not discuss them anew at this juncture, we think it is important to note that the reluctance of courts to hold responsible the owner of land upon which a railroad right of way is maintained is not restricted to instances where the claim is rooted in the alleged presence of inflammable materials on the right of way. Cf. p. 15, *supra*. For while there are innumerable cases holding the railroad accountable for its failure to prevent the spread of a fire developing on its right of way—following the very principle that appellant seeks to apply against the United States—,³² there has not been to our knowledge a single occasion upon which the possessor of a reversionary interest has been held similarly accountable.

CONCLUSION

Appellant here would hold the United States liable under the Tort Claims Act for the alleged damage to its property flowing from a fire which it concedes was

³² See *e.g.*, *Jordan v. Spokane, P. & S. Ry. Co.*, 109 Wash. 476, 186 Pac. 875 and cases cited 42 A. L. R. 783, 795, 812 *et seq*, 18 A. L. R. 2d 1081, 1089, 1091. These cases show that if the fire did not originate through the negligence of the railroad it is liable only for the failure to exercise due care to prevent its spread. Absolute liability generally is imposed in circumstances where the fire was due to improper operation of a locomotive.

set by an improperly operated Port Angeles Western Railroad locomotive on the Railroad's improperly maintained right of way across the national forest and which, as the complaint itself shows, was fought by the Forest Service in the capacity of a public fireman. As the District Court correctly perceived, its claim has no substance when viewed in the light of the statutory and common law duties of a private landowner in the State of Washington, and in the light of the scope of the Government's waiver of immunity from suit in tort reflected by the Tort Claims Act.

It is respectfully submitted that the judgment of the court below should be affirmed.

WARREN E. BURGER,
Assistant Attorney General,
 CHARLES P. MORIARTY,
United States Attorney,
 FRANCIS N. CUSHMAN,
Assistant United States Attorney,
 SAMUEL D. SLADE,
 ALAN S. ROSENTHAL,
 SONDR A KAPLAN,
Attorneys, Department of Justice.

OCTOBER, 1954.

APPENDIX

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The relevant provisions of the Revised Code of Washington are as follows:

Section 4.24.040 (R.R.S. § 5647).

Damages for negligently permitting fire to spread. If any person for any lawful purpose kindles a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fails so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage.

Section 76.04.370 (R.R.S. § 5807)

Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this sec-

tion shall apply to land for which a certificate of clearance has been issued.

If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence.

Section 76.04.450 (R.R.S. § 5818)

Olympic Peninsula Area Protection. All forests and timber upon all land in the state, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard caused by reason of the unusual quantity of fallen timber upon such land. It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire.

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,
vs.
UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

INDEX

	<i>Page</i>
Jurisdiction	1
Statement of the Case.....	2
Specifications of Error.....	9
Summary of Argument.....	10
Argument	13
Part I. Construction of Complaint.....	13
Part II. A Private Individual Under Like Circumstances, and Therefore the United States, Would Be Liable.....	14
A. Under Common Law.....	15
1. Duty as landowner.....	15
2. Duty as volunteer.....	19
3. Duty greater with superior knowledge.....	21
B. Duty Under Washington Statutes.....	21
C. Under Contract	23
D. Conclusion of Part II of Argument.....	25
Part III. Extent of Waiver of Sovereign Immunity	26
A. Immunity from Tort Liability Is Waived in Sweeping Language	26
B. Limitations on Waiver of Immunity.....	30
1. The first part of Section 2680(a).....	31
2. The second part of Section 2680(a).....	31
Part IV. <i>Dalehite v. United States</i>	
No Analogous Liability Theory—Public Firemen Theory	36
A. The “No Analogous Liability” Argument Is Inapplicable	37
B. The Doctrine of Municipal Immunity from Liability for Acts of Municipally Employed Firemen Is Not Applicable.....	44
1. Facts in the <i>Dalehite</i> case indicate that “public firemen immunity” is not properly involved	45
2. The principle of municipal immunity from	

liability arising out of governmental functions, including fire fighting, should not be extended to the Federal Government.....	46
3. Even if the principle of municipal immunity for acts of public firemen extends to the United States, such immunity does not exist as to the case at bar.....	49
(a) The Forest Service employees were not firemen	50
(b) The Forest Service employees were engaged in proprietary function of the Government	51
(c) The United States had a duty as landowner to fight, pursue and extinguish fires originating on its lands. That duty is unaffected by the acts or omissions of public firemen	55
(d) The Government is liable because of unlawful, improper and negligent conditions and practices on Government lands prior to the outbreak of fire	56
Conclusion	57
Appendix A—Federal Statutes.....	61-63
Appendix B—Washington Statutes.....	65-76

TABLE OF AUTHORITIES

Cases

<i>Anderson v. John L. Hayes Construction Co.</i> , 243 N.Y. 140, 147, 153 N.E. 28.....	29
<i>Bloedel-Donovan Lumber Mills v. United States</i> , 74 F.Supp. 470 (Ct. Cl. 1947).....	43
<i>Bowden v. United States</i> , 200 F.2d 176 (4th Cir. 1952)	42
<i>Brewer v. United States</i> , 108 F.Supp. 889 (M.D. Ga. 1952)	19, 42
<i>Cerri v. United States</i> , 80 F.Supp. 831 (N.D. Calif. 1948)	40, 48
<i>Chesapeake & Ohio Railway Company v. United States</i> , 139 F.2d 632 (4th Cir. 1944).....	41

Cases

	<i>Page</i>
<i>Costley v. United States</i> , 181 F.2d 723 (5th Cir. 1950)	33
<i>Crandall v. City of Amsterdam</i> , 280 N.Y. 527, 19 N.E. 2d 926 (Court of Appeals, New York, 1939).....	55
<i>Dalehite v. United States</i> , 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953)	9, 12, 26, 30, 32, 33, 35, 36, 37, 44, 45, 46, 52
<i>DeBonis v. United States</i> , 103 F.Supp. 123 (W.D. Pa. 1952)	34, 40
<i>Dishman v. United States</i> , 93 F.Supp. 567 (D. Md. 1950)	33
<i>P. Dougherty Co. v. United States</i> , 97 F.Supp. 287 (D. Dela. 1951)	20
<i>Ellison v. United States</i> , 98 F.Supp. 18 (D. Nev. 1951)	41
<i>Employers' Fire Ins. Co. v. United States</i> , 167 F.2d 655, 656, 657 (9th Cir. 1948).....	28, 29
<i>Federal Housing Administration v. Burr</i> , 309 U.S. 242, 245, 84 L.Ed. 724, 728, 60 S.Ct. 488.....	29
<i>Feres v. United States</i> , 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.....	36
<i>Forstmann Woolen Co. v. Murray Sices Corpora- tion</i> , 10 FR.D. 367, 370.....	13
<i>Gilroy v. United States</i> , 112 F.Supp. 664, 665-66 (D.D.C. 1953)	29
<i>Griggs v. United States</i> , 178 F.2d 1 (10th Cir. 1949)..<	33
<i>Hillstrom v. City of St. Paul</i> , 134 Minn. 451, 159 N.W. 1076 (1916)	55
<i>Jordan v. Spokane, Portland & Seattle Railway</i> 109 Wash. 476, 186 Pac. 875 (1920).....	15
<i>Keifer & Keifer v. Reconstruction Finance Corpora- tion</i> , 306 U.S. 381, 390, 391, 396, 397, 83 L.Ed. 784, 789, 790, 793, 59 S.Ct. 516.....	29
<i>Lacey v. United States</i> , 98 F.Supp. 219 (D. Mass. 1951)	20
<i>Ledbetter v. Farmers Bank & Trust Co.</i> , 142 F.2d 147 (4th Cir. 1944).....	13
<i>Lehman v. Maryott & Spencer Logging Co.</i> , 108 Wash. 319, 184 Pac. 323 (1919).....	17

Cases

	<i>Page</i>
<i>McCann v. Chicago, Milwaukee & Puget Sound Railway Company</i> , 91 Wash. 626, 158 Pac. 243 (1916) ..	15
<i>McGill v. United States</i> , 200 F.2d 873 (3rd Cir. 1953)	39, 42
<i>Meredith v. John Deere Plow Co. of Moline</i> , 89 F. Supp. 787 (S.D. Iowa 1950)	13
<i>Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad & Navigation Company, et al.</i> , 32 Wn.2d 256, 201 P.2d 207 (1948)	18
<i>Old Colony Insurance Co. v. United States</i> , 168 F.2d 931 (6th Cir. 1948)	27
<i>Oman v. United States</i> , 179 F.2d 738 (10th Cir. 1949)	34
<i>Osborn v. City of Whittier</i> , 103 Cal.App.2d 609, 230 P.2d 132 (1951)	56
<i>O'Toole v. United States</i> , 206 F.2d 912, 918 (3rd Cir. 1953)	30, 39
<i>Reconstruction Finance Corporation v. Childress</i> , 186 F.2d 698 (8th Cir. 1950)	41
<i>Sandberg v. Cavanaugh Timber Co.</i> , 95 Wash. 556, 164 Pac. 200 (1917)	15
<i>Sheridan v. Aetna Casualty, etc., Co.</i> , 3 Wn.2d 423, 100 P.2d 1024 (1940)	24
<i>Smith v. United States</i> , 116 F.Supp. 801 (D. Dela. 1953)	33, 39, 42
<i>Smith v. United States</i> , 117 F.Supp. 525 (N.D. Calif. 1953)	34, 39, 43
<i>Somerset Seafood Co. v. United States</i> , 193 F.2d 631 (4th Cir. 1951)	34, 40, 48
<i>Sprague v. City of St. Louis</i> , 251 Mo. 624, 158 S.W. 16 (1913)	55
<i>State v. City of Marshfield</i> , 122 Ore. 323, 259 Pac. 201 (1927)	55
<i>State of Maryland, for Use of Pumphrey v. Manor Real Estate & Trust Co.</i> , 176 F.2d 414 (4th Cir. 1949)	43

Cases

	<i>Page</i>
<i>Steitz v. Beacon</i> , 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342.....	37, 52
<i>Union Trust Co. of District of Columbia v. United States</i> , 113 F.Supp. 80 (D.D.C. 1953).....	20, 40
<i>United States v. Bowers</i> , 202 F.2d 139 (5th Cir. 1953)	42
<i>United States v. Gaidys</i> , 194 F.2d 762 (10th Cir. 1952)	33
<i>United States v. Gray</i> , 199 F.2d 239 (10th Cir. 1952)	20, 33
<i>United States v. Kesinger</i> , 190 F.2d 529 (10th Cir. 1951)	34
<i>United States v. Praylou</i> , 208 F.2d 291 (4th Cir. 1953)	33, 39
<i>United States v. Shaw</i> , 309 U.S. 495, 501, 84 L.Ed. 888, 892, 60 S.Ct. 659.....	29
<i>United States v. Stewart</i> , 201 F.2d 135 (5th Cir. 1953)	40
<i>United States v. Yellow Cab Co.</i> , 340 U.S. 543, 95 L. Ed. 523, 71 S.Ct. 399 (1951).....	27, 28, 47
<i>Ure v. United States</i> , 93 F.Supp. 779 (D. Ore. 1950)	19, 33, 41
<i>Walters v. Mason County Logging Company</i> , 139 Wash. 265, 246 Pac. 749 (1926).....	17
<i>Western Auto Supply Agency v. Phelan</i> , 104 F.2d 85 (9th Cir. 1939).....	24
<i>Whiteside v. Benton County</i> , 114 Wash. 463, 195 Pac. 519 (1921)	54
<i>Wood & Iverson, Inc., v. Northwest Lumber Company</i> , 138 Wash. 203, 244 Pac. 712 (1926) confirmed on rehearing, 141 Wash. 534, 252 Pac. 98 (1927)	18

Texts

42 A.L.R. 821.....	15
111 A.L.R. 1149.....	15
18 A.L.R.2d 1097.....	15
63 C.J.S. 29, §746.....	53
65 C.J.S. 349.....	23

Texts**Prosser on Torts**

p. 177, §30	14
p. 183	19
p. 194	19
p. 236, §36	21
p. 206, §33	24

2 Restatement of the Law of Torts

§§497, 321, 323, 325.....	19
§§289, 290	21

STATUTES**Washington Statutes**

Rem. Rev. Stat. §951	54
§2523	22, 65
§5647	65
§5649	65
§5784	25, 59
1941 Supp. §5794	66
§5795	68
§5795-1	69
§5796	69
§5803	70
§5804	70
1945 Supp. §5806	21, 71
§5807	22
Supp. §5807	72
§5808	73
1949 Supp. §5817-1	74
Supp. §5817-2	74
Supp. §5817-3	74
Supp. §5817-4	75
§5818	22, 75
RCW §4.08.120	54
§4.24.040	18, 65
§4.24.060	65

TABLE OF AUTHORITIES

ix

Washington Statutes	Page
RCW ch. 76.04	23
§76.04.050	25, 59
§76.04.220	22, 65
§76.04.250	66
§76.04.260	66
§76.04.270	66
§76.04.280	68
§76.04.290	69
§76.04.310	69
§76.04.340	70
§76.04.350	70
§76.04.370	22, 72
§76.04.380	21, 71
§76.04.400	73
§76.04.410	74
§76.04.420	74
§76.04.430	74
§76.04.440	75
§76.04.450	22, 75

Federal Statutes

16 U.S.C. §565	25, 59, 62
28 U.S.C. §1291	2
§1294(1)	2
§1346(b)	1, 10, 27, 28, 37, 40, 47
§2671-§2680, incl.	1
§2674	10, 27, 28, 37, 40
§2680	12, 30, 35, 47, 61
§2680(a)	12, 30, 31, 35

RULES

Federal Rules of Civil Procedure

Rule 12(b)	13
Rule 12(b)(6)	13
Rule 56	13

United States Court of Appeals

For the Ninth Circuit

RAYONIER INCORPORATED, a corporation,	} No. 14329
vs.	
UNITED STATES OF AMERICA,	
<i>Appellant,</i>	
<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

BRIEF OF APPELLANT

(**Note:** For convenience, appellant sometimes is referred to herein as Rayonier and appellee sometimes is referred to as the Government or the United States or the Forest Service. For brevity, the amended complaint sometimes is referred to as the complaint.)

(Many Federal and Washington State statutes referred to in this brief are, for convenience, set forth in full in the appendix hereto.)

JURISDICTION

Jurisdiction of the District Court for this action is claimed and acquired under Title 28, U.S.C. §§ 1346(b) and 2671 through 2680, inclusive, commonly known as the Federal Tort Claims Act, the United States of America being defendant, and is also claimed and acquired because the acts and omissions complained of by Rayonier and the damage to Rayonier's property de-

scribed in the complaint occurred within the Western District of Washington, Northern Division (R. 3).

Jurisdiction of this Court is claimed and acquired under Title 28, U.S.C. §§ 1291 and 1294(1). The Government moved to “dismiss the action because the amended complaint fails to state a claim against the Government upon which relief can be granted” (R. 49). The District Court granted the motion to dismiss and, Rayonier having elected to stand on its amended complaint, dismissed said amended complaint with prejudice (R. 66-67). The order of dismissal, therefore, was a final order and appealable to this Court. Notice of appeal was duly given and filed (R. 67) and the record in the District Court was duly filed in this Court (R. 71).

There are no treaties of the United States or statutes the validity of which is involved.

STATEMENT OF THE CASE

The complaint has been carefully drawn and worded and we urge full reading thereof (R. 3-33).

This is a suit for damages caused by a forest fire which burned on September 20, 1951, and for several days thereafter. After the fire broke out on September 20th, there was little that anyone could do to stop it. The torts on which liability is claimed occurred prior to that date, but were the direct and proximate cause of the fire damage.

Boiled down, the Government’s liability is that of a landowner who knowingly permitted nuisance and fire hazardous conditions and practices on its land, contrary to law and statute, and whose employees, with full

knowledge of the dangerous conditions and risks involved and having full means at their disposal to eliminate or greatly minimize the risks, nevertheless negligently and without due care, failed to take action to prevent a fire which started on its property on August 6th, failed to contain and control it in its preliminary stages, and failed to pursue and extinguish the resultant smoldering fires which burned for forty days and which, on September 20th, spread and broke into a catastrophic blaze.

The amended complaint alleges, among other things, the following:

The United States owns and operates extensive stands of timber and lands under the administration of the Forest Service of the Department of Agriculture, the same being held and operated for pecuniary gain and profit, that is, in a "proprietary" rather than "governmental" capacity. The Government is a timber and landowner and operator just as are Rayonier and other private parties in the area involved in this suit (R. 5-6).

On and for many years prior to August 6, 1951, the Government owned lands across which was a railroad right of way of the Port Angeles Western Railroad, but the right of way, as well as the adjacent lands, were subject to control and access by the Government. On the right of way and adjacent lands of the Government were accumulations of logging and clearing debris, rotten ties, dry grasses, brush and trees which constituted a nuisance under the statutes of Washington and were a fire hazard, all of which the Forest Service employees knew. The railroad company operated defective and

deficient equipment over the right of way and failed to have its passing trains followed by a speeder or other equipment to watch for fires that might be caused by the train, contrary to the requirements of Washington statutes, all of which was known to the Forest Service employees (R. 11-13).

About noon, August 6, 1951, approximately six spot fires caused by a passing train started on and in the vicinity of the right of way on Government lands. Five of them were soon extinguished and the sixth could have been but wasn't. The fire continued to spread and by nightfall covered about sixty acres, where it was confined and controlled. It could have been extinguished but wasn't. About 2:30 p.m. on August 7th, the fire broke away and spread over a 1600-acre area of logged-off lands. The fire in the 1600-acre area was contained and controlled by August 11th (R. 12-15). It remained in smoldering form until the early hours of September 20th, when sparks from it blew into the nearby slash and timber and a tremendous forest fire resulted which burned an area ranging up to five miles in a north-south direction and twenty miles in an east-west direction (R. 15, 18-25). That fire caused the damage complained of (R. 29).

Fire fighting activities were under the exclusive supervision and control of the District Ranger and his subordinates in the Forest Service (R. 13-14). Fifteen negligent acts and omissions proximately causing the damage are alleged (R. 26-29). Without hereby waiving any of the claims of negligence or intending to limit them, the negligence may generally be classified as fol-

lows: Permitting the long continued existence of fire hazardous conditions on the Government's lands, contrary to the statutes of the State of Washington (R. 11-12, 7-8); permitting the operation of defective and deficient equipment on those lands by the Port Angeles Western Railroad, and permitting improper practices by the railroad, all of which constituted fire hazards and were contrary to statute (R. 11-13, 7-8); failing to control and completely extinguish the fire in each of its three early stages, that is, at the spot fire stage, the 60-acre stage, and the 1600-acre stage (R. 15, 17-26); failing to use sufficient men and equipment and adequate methods to control, hunt out and extinguish all fire, although sufficient men, equipment and water were at all times available and there was ample time in which to perform the work (R. 18); and lastly, in continuing negligent and inadequate practices in the face of weather conditions, weather forecasts, fuel conditions, topography, and the tremendous value of property which was in jeopardy because of the smoldering fire (R. 10, 20-21, 23).

The Government's land and timber need looking after just as do the land and timber owned by private parties. Like private property owners, the Government employs caretakers whose duties are many and varied. As caretakers, the District Ranger and his crew had the duty to see that the Government's lands were maintained and kept in the manner required of all such landowners by the law and the statutes of the State of Washington; to patrol and inspect all lands in the area; to discover, eliminate and abate conditions thereon which constituted fire hazards; to watch for the outbreak of fire, and

when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same; and to supervise, direct and control activities in fighting and suppressing such fires. They had the authority and power to hire men and equipment to fight fires, and to summon and impress help to prevent, suppress and control fires (R. 8-10, 16-18).

A large area of lands, including those mentioned in the complaint, had, by contract between the Forest Service and the State of Washington, been established as a Forest Service Protective Area. By said contract the Forest Service agreed to protect said area against fire and to take immediate, vigorous action to control all fires originating on or threatening such lands. The contract also provided, among other things, as follows (R. 6-7):

“9. Nothing herein contained shall be understood to impair the right of the United States, the State of Washington, or any person or corporation to recover the costs of suppression and damages on account of fires resulting from the negligent, wilful, or unlawful act of any forest landowner or timber operator within said protective units or any other person or corporation, or to impair any other rights of similar nature under the Washington Forestry Laws, under the Federal laws, or under general law.”

Protection and preservation of the forests is a matter of first concern, both to the residents of the area and to the timber and mill operators. As a consequence, men willingly and voluntarily respond to calls for assistance in fighting fires, and owners of equipment willingly and voluntarily furnish their equipment. A

Fire Suppression Plan for the Forest Service Protective Area had previously been adopted and approved by the Supervisor of the Olympic National Forest, and was to be followed and employed by the District Ranger and his subordinates. That Plan was in effect at all times involved. The Plan included, among other things, a list of privately employed men who and privately owned equipment which were available to fight and suppress any fire within the Area, and the method of getting such men and equipment to the scene of the fire. Additional men and equipment were also available. The Plan contemplated that the District Ranger and his subordinates would call upon and use all men and equipment necessary to suppress and extinguish fires, and it was one of the District Ranger's duties to do so. The Forest Service did not own, maintain or operate a fire department or fire fighting organization as such, but, just as other owners of timber and timberlands in the area, it had some men and equipment available to fight fires, and knew where additional men and equipment could readily and quickly be obtained (R. 16-18).

There are two rivers in and adjacent to the 1600-acre area which could provide more than enough water to supply all conceivable requirements in fighting the fire. There were useable and safe roads both within the 1600-acre area and the lands adjacent thereto providing access to all parts of it. The nearby railroad could also be utilized (R. 19-20).

Fires smolder and burn in debris, logs and stumps for long periods with no visible flame. That was the con-

dition which continued in the 1600-acre area from August 11th to September 20th, when the fire broke away (R. 21-22). The Forest Service employees knew this. They could have combed the area, and especially the key points, with men and equipment to search out and extinguish all such smoldering fire (R. 6-9, 21-23). Notwithstanding this, notwithstanding the extremely dry and hazardous conditions which had prevailed for four months prior to August and during all times mentioned in the complaint, and notwithstanding the extensive stands of timber which were imperiled, the Forest Service did practically nothing for the forty days from August 11th to September 20th (R. 10, 4-5, 21).

Northeasterly winds are not uncommon in the area. They are dry winds, decreasing the humidity and increasing the fire hazard. Such winds, sweeping over the 1600-acre area, would naturally carry sparks westerly and southerly into the big timber. On September 13th, such a wind blew sparks out of smoldering debris near the westerly boundary of the 1600-acre area, causing a fire close by. That incident was observed and occurred when men were present, and as a consequence the fire was extinguished (R. 20-23).

With full knowledge of all of the foregoing, the District Ranger, Sanford Floe, and his assistants, employed only a few men and a few items of equipment and tools during the forty days, keeping the area mostly on a patrol basis during the day and maintaining no men on the job and no lookouts after the normal working day (R. 21-25).

In spite of weather forecasts of northeasterly winds

and decreasing humidity, the same indifferent practice was followed by the Forest Service employees on September 19th and 20th. The anticipated wind blew sparks from the 1600-acre into the adjoining slash and timber, and the big fire was under way (R. 20-26).

Rayonier's timber, lands, railroad, bridges, telephone system and other property were damaged or rendered useless by the fire and Rayonier incurred expenses in connection therewith, for which recovery is sought (R. 29-33).

The District Court granted appellee's motion to dismiss the amended complaint, with prejudice, on the ground that it fails to state a claim against appellee upon which relief can be granted (R. 66). This appeal is from the order granting the motion.

SPECIFICATIONS OF ERROR

The District Court erred :

1. In granting the motion to dismiss the amended complaint and in dismissing the amended complaint (R. 66-67) ;

2. In finding that the Forest Service employees, of whose negligent acts and omissions complaint is made, were public firemen (R. 38-39) ;

3. In holding that because the Forest Service employees were public firemen the case at bar is controlled by *Dalehite v. United States*, 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953) (R. 37) ;

4. In holding that notwithstanding the Federal Tort Claims Act the doctrine of immunity from liability for

negligence of firemen which is applicable to municipalities is also applicable to the Federal Government;

5. In holding that the Federal Government is immune from liability for several negligent acts and omissions simply because its public firemen were involved in some but not all thereof, even though the negligence complained of includes:

Negligent and unlawful conditions and practices existing and occurring on lands owned and operated by the United States for pecuniary gain and profit, and

Negligent acts and omissions of federal employees in performing or failing to observe and perform duties required of a landowner by the law and statutes of the State of Washington.

SUMMARY OF ARGUMENT

1. All well pleaded allegations of the complaint are deemed admitted. The complaint must be construed in a light most favorable to plaintiff.

2. The Federal Tort Claims Act states that the United States shall be liable in tort “ * * * in the same manner and to the same extent as a private individual under like circumstances * * * ” (28 U.S.C. Sec. 2674) and “ * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” (28 U.S.C. Sec. 1346(b)). A private individual standing in the place of the United States under the circumstances alleged in the amended complaint would be liable to appellant under Washington law.

3. The essential elements of actionable negligence are the existence of a duty, a breach thereof, and resulting injury.

a. A private individual under like circumstances would owe a duty and be liable to Rayonier:

Under common law, by which, if defendant's conduct threatens harm to plaintiff which a reasonable man could foresee, the defendant owes plaintiff a duty. This duty would exist in such individual, both as a landowner and as a volunteer. This principle applies with even greater force where the acting party (such as the Forest Service employees acting in this case) has superior knowledge of the possible harm.

Under the statutes of the State of Washington.

Under contract between the State of Washington and the Forest Service by which the Forest Service undertook to fight and suppress the fire. It is immaterial whether Rayonier could sue the United States under the contract. The latter's duty extends to Rayonier. A private individual could have been party to such contract instead of the United States because such arrangement is authorized by both State and Federal statutes.

b. A private individual under like circumstances would be liable to Rayonier because of failure to observe and comply with the law and statutes of the State of Washington and because of the many negligent acts and omissions alleged in the complaint.

c. Rayonier was damaged as a direct and proximate result of the breach of the several foregoing duties, and of the negligence, as alleged in the complaint.

Since a private individual could have been in like cir-

cumstances and would have been liable to Rayonier under the law of the State of Washington, it follows that the United States is liable.

4. The United States has waived immunity from tort liability in broad language, and retains immunity only in the instances excepted in 28 U.S.C. §2680. None of those exceptions is applicable to the case at bar. The only one urged by the United States as applicable is subsection 2680(a).

5. The acts and omissions complained of did not involve exercise or performance of a discretionary function within the meaning of subsection 2680(a).

6. *Dalehite v. United States, supra*, is neither applicable to nor controlling of the case at bar. The Court's language must be read in the light of the facts in that case, which facts are so different from the case at bar as to render the opinion valueless as precedent.

7. Under the Federal Tort Claims Act, there is no justification for applying to the Federal Government the doctrine of immunity of municipalities from liability for torts committed in the performance of a governmental function as distinguished from a proprietary function. The Act recognizes no such distinction except as the limited instances and functions specifically described in 28 U.S.C. §2680 might be characterized as governmental. Even if principles of municipal law are properly extended to the case at bar, the United States would still be liable because: (a) the acts and omissions complained of were pursuant to a proprietary function on lands owned and operated by the United States for pecuniary gain and profit, and (b) a municipality

would be liable for failure to use due care to prevent, fight and extinguish fire originating on its lands, whether such lands be held in a governmental or proprietary capacity and whether attended by public firemen or others.

ARGUMENT

Part I.

Construction of Complaint

All of the well pleaded allegations of fact in the amended complaint are deemed admitted by appellee's motion to dismiss.¹ On a motion to dismiss which challenges the sufficiency of an amended complaint to state a claim upon which relief can be granted,² the amended complaint must be construed in a light most favorable to the plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.³ Neither ap-

¹ Rules 12(b) and 56 of the Federal Rules of Civil Procedure. *Ledbetter v. Farmers Bank & Trust Co.*, 142 F.2d 147 (4th Cir. 1944); certiorari denied 323 U.S. 719, 89 L.Ed. 578, 65 S.Ct. 48; rehearing denied 323 U.S. 813, 89 L.Ed. 647, 65 S.Ct. 112; rehearing denied 324 U.S. 886, 89 L.Ed. 1435, 65 S.Ct. 682; motion denied 325 U.S. 837, 89 L.Ed. 1963, 65 S.Ct. 1189.

² Rule 12(b) (6), Federal Rules of Civil Procedure.

³ *Meredith v. John Deere Plow Co. of Moline*, 89 F. Supp. 787 (S.D. Iowa 1950); affirmed 185 F.2d 481 (8th Cir. 1950); certiorari denied 341 U.S. 936, 95 L.Ed. 1364, 71 S.Ct. 856. See also *Forstmann Woolen Co. v. Murray Sices Corporation*, 10 F.R.D. 367 at 370, where the District Court for the Southern District of New York said:

“ * * * under the Federal Rules a pleading should not be dismissed unless it appears to a certainty that

pellee nor the District Judge has asserted that anything in the amended complaint is not well pleaded, and this Court may therefore accept as true every fact alleged.

Part II.

A Private Individual Under Like Circumstances, and Therefore The United States, Would Be Liable

The Federal Tort Claims Act states that the United States shall be liable in tort “ * * * in the same manner and to the same extent as a private individual under like circumstances * * * ” (28 U.S.C. Sec. 2674) and “ * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” (28 U.S.C. Sec. 1346 (b)). A private individual standing in the place of the United States under the circumstances alleged in the amended complaint would be liable to appellant under Washington law.

The essential elements of actionable negligence are the existence of a duty, a breach thereof, and resulting injury.⁴

A private individual under like circumstances would have owed a duty to Rayonier: under the common law both as a proprietor of land and timberlands and as a volunteer (R. 7-8); under the statutes of the State of Washington (R. 8); and under contract (R. 6-7). Detailed discussion of these three duties follows.

⁴ Prosser on Torts, §30, Elements of Cause of Action, especially page 177.

the pleader is entitled to no relief under any state of facts which could be proved in support of the claim.”

A. Under common law, if defendant's conduct creates or increases an unreasonable risk of harm to plaintiff which an ordinary man could foresee, the defendant owes plaintiff a duty. In the case at bar, this duty would exist both as a landowner and as a volunteer. This principle applies with even greater force where the acting parties (such as the Forest Service employees acting in this case) have superior knowledge of the possible harm.

1. Duty as landowner.

After the discovery of fire on his premises a landowner must exercise reasonable care to prevent its spread to adjoining lands and he will be liable for damages caused through his failure to exercise such reasonable care. In the case of *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200 (1917), the court used the following language, commencing at page 558:⁵

“The authorities convince us that there may be negligence such as to render the owner of premises liable to his neighbor in his failure to use due diligence in preventing the spread of a fire originating upon his own land though it so originate without any act or fault of his own. The common law seems to have rendered an owner of premises on which fire starts, regardless of the manner of its starting, absolutely liable for damages which his neighbor suffers therefrom, but the harshness of this doc-

⁵ To the same effect is *McCann v. Chicago, Milwaukee & Puget Sound Railway Company*, 91 Wash. 626, 158 Pac. 243 (1916), and *Jordan v. Spokane, Portland & Seattle Railway Company*, 109 Wash. 476, 186 Pac. 875 (1920). See also cases from other jurisdictions which are included in the following annotations: 42 A.L.R. 821, 111 A.L.R. 1149 and 18 A.L.R.2d 1097.

trine has been much modified in both England and this country in recent times. In the text 11 R.C.L. 940, the learned editors state the present day rule as follows:

“ ‘The general rule in this country, as in England, is now well settled that when a private owner of property sets out fire on his own premises for a lawful purpose or when a fire accidentally starts thereon, he is not, in the absence of a statute to the contrary, liable for the damage caused by its communication to the property of another, unless it started through his negligence, or he failed to use ordinary skill and care in controlling or extinguishing it.’

“In Bishop’s Non-Contract Law, at §833, that learned author says:

“ ‘Since fire, one of the most beneficent servants of man, does not from its own nature imperil surrounding persons and objects, the careful setting and keeping of it in one’s dwelling-house, shop, field, or elsewhere, for a useful purpose, creates no liability to another injured by its spreading, through some accident not reasonably to be anticipated. But a fire set or looked after negligently, if by reason of such negligence it communicates to a neighbor’s property and destroys it, will give the neighbor an action for the damages.’

“In this text it will be observed that it is at least inferentially stated that there may be negligence rendering an owner of premises liable in such cases regardless of how the fire starts upon his premises. The reports furnish but few instances of decisions being rendered wherein there is considered the question of the measure of the duty of a person on whose premises a fire is started by some agency for which he is not responsible to prevent its spread

to his neighbor's property. The decisions touching this exact question, however, seem to be in harmony in holding that there is a measure of responsibility on the part of an owner growing out of such a situation which requires him to use reasonable effort to prevent the spread of a fire occurring upon his premises, apart from his own act or neglect attending the starting of the fire, which may render him liable to his neighbor as for negligence."

This statement of common law was confirmed in *Lehman v. Maryott & Spencer Logging Co.*, 108 Wash. 319, 184 Pac. 323 (1919) where the court said:

"The first question is whether the appellant was negligent in looking after the fire after it had been started [on appellant's lands] * * *. The rule in such cases is that one starting a fire on his own land is required to exercise reasonable care to prevent it from spreading to a neighbor's land. If, in this regard, he acts as a reasonably prudent person would have acted under like or similar circumstances, he is not guilty of negligence. On the other hand, if he fails to so act, he has not exercised that degree of care which the law requires of him and would be chargeable with negligence. * * * "

In holding for defendant, the court found there was no negligence.

Walters v. Mason County Logging Company, 139 Wash. 265, 246 Pac. 749 (1926), relied upon by the Government in the District Court, ruled in favor of a landowner who exercised ordinary care and was not negligent, the loss being due to an intervening cause not foreseeable or controllable. Contrary to the Government's contentions below, the *Walters* case supports

Rayonier's theory of duty. The court there said at page 271:

“In the present case, the origin of the fire was known to be upon respondent's premises. The duty of respondent, after notice of the fire burning upon its property, was the same as if the fire had been set out by respondent itself. In other words, its duty, under the law announced in the *Jordan* case, *supra*, was to use all reasonable efforts to prevent the spread of the fire to the property of others. That is, also, a statutory duty. Rem. Comp. Stat., §5647 (P.C. §9131-41); *Burnett v. Newcomb*, 126 Wash. 192, 217 Pac. 1017.” (R.C.W. 4.24.040.)

One who has a duty to prevent or extinguish fire originating on his lands must act as a prudent and careful person would do under like circumstances. In *Michigan Millers Mutual Fire Insurance Company v. Oregon-Washington Railroad and Navigation Company, et al*, 32 Wn.2d 256, 201 P.2d 207 (1948), the Washington Supreme Court, in holding a railroad liable for a clearing fire started on its right of way, said:

“The railroads did not have sufficient equipment, nor a sufficient crew, and did not display the proper care and caution in ‘handling and controlling such a destructive agency.’ Under the circumstances, such lack of care constituted negligence.”

See also *Wood & Iverson, Inc. v. Northwest Lumber Company*, 138 Wash. 203, 244 Pac. 712 (1926), confirmed on rehearing, 141 Wash. 534, 252 Pac. 98 (1927).

In the case at bar, the Forest Service failed to use sufficient men and equipment at all stages of the fire (R. 13, 14, 15, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28 and 29).

2. *Duty as volunteer.*

Even one who undertakes gratuitously to render services which he should recognize as possibly affecting the safety of another person's property is liable in tort if he fails to exercise reasonable care in the performance of said services. One whose property may be affected by services voluntarily undertaken by such a defendant is entitled to assume that the defendant will perform said services in a reasonably prudent manner and he may rely upon such assumption and hold the defendant liable for failure to exercise ordinary care.⁶

In a number of Federal Tort Claims cases, the United States was held liable for undertaking and assuming the performance of services.⁷

⁶ See 2 Restatement of the Law of Torts, §§497, 321, 323 and 325. See also Prosser on Torts, where that authority, at page 183, states the rule as follows:

"If the defendant's conduct threatens harm, which a reasonable man would foresee, to A, then he is negligent toward A, and by the great weight of authority he is liable for all damage resulting directly to A, even if the damage itself was not to be anticipated."

At page 194, Prosser goes on:

"Certainly a duty arises if he has deprived the plaintiff of the opportunity of protecting himself, or of the opportunity of obtaining aid, or some protection which a third person might have given him. It may be that in cases where the danger is extreme, the law would go beyond this, and find a duty whenever the affirmative conduct has begun to affect more or less directly and immediately the plaintiff's chances of escaping harm * * *."

⁷ *Ure v. United States*, 93 F.Supp. 779 (D. Ore. 1950), where the Government assumed the operation and maintenance of a canal; *Brewer v. United States*, 108 F. Supp. 889 (M.D. Ga. 1952), where the United States

In *P. Dougherty Co. v. United States*, 97 F.Supp. 287 (D. Dela. 1951) the United States was held liable for negligence of the Coast Guard when voluntarily and gratuitously rendering towing service to a distressed vessel. The court said, at page 292:

“As Justice Cardozo said in *Glanzer v. Shepard*, ‘It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.’ In other words, the mere fact that the services are rendered voluntarily and without expectation of reward does not relieve the actor of the duty to exercise some degree of care. The general principle, as already stated, is that even a volunteer may be held liable not only for misconduct in rendering the services which he has undertaken to render, but also for negligence, to some degree at least.”

was held liable when it undertook the construction, maintenance and operation of a civilian swimming pool; *Union Trust Co. of District of Columbia v. United States*, 113 F.Supp. 80 (D.D.C. 1953), where the United States was held liable for negligence when it assumed the function of regulating air commerce and undertook the responsibility of regulating the flow of traffic at a public airport; *United States v. Gray*, 199 F.2d 239 (10th Cir. 1952), where the United States, notwithstanding the fact that it had no duty to care for the patient, undertook to treat the patient and, having done so negligently, was held liable for her injuries.

See also *Lacey v. United States*, 98 F.Supp. 219 (D. Mass. 1951), where the United States District Court for the District of Massachusetts said:

“It is true that, while the common law imposes no duty to rescue, it does impose on the Good Samaritan the duty to act with due care *once he has undertaken rescue operations.*” (Italics are the court’s.)

3. Duty greater with superior knowledge.

The principles stated above apply a minimum standard for an ordinary defendant, but if, in fact, the defendant has superior knowledge, commensurately higher standards are required.⁸

B. Duty under Washington statutes.

Rem. Supp. 1945 §5806, R.C.W. 76.04.380, reads in part as follows:

“ * * * The owner * * * of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; * * * ”

The Government had actual and immediate notice (R. 13) of the fire on August 6, 1951, and undertook to act promptly (R. 14). Formal written notice would have been a vain and useless act. The Government contended below that the foregoing statute pertains only to collection by the state from the landowner of the cost of fighting fire. The contention is erroneous. The statute treats with several subjects, one of which is the imposition on the owner of land of the duty to make every reasonable effort to control and extinguish the fire on his land and to pursue and fight the fire on other lands.

⁸“But if he has in fact knowledge, skill, or even intelligence superior to that of the ordinary man, the law will demand of him conduct consistent with it.” Prosser on Torts, page 236, §36. See also 2 Restatement of the Law of Torts, §§289 and 290. The Forest Service employees had superior knowledge, being professional foresters.

Rem. Rev. Stat. §5807, R.C.W. 76.04.370, reads in part as follows:

“Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall, if so declared by the supervisor of forestry, constitute a fire hazard and the owner or owners thereof and the person, firm or corporation responsible for its existence, if such be not the owner, are required to abate such hazard under the general direction of the supervisor of forestry. * * *

Other statutes involved include:

Rem. Rev. Stat. §2523, R.C.W. 76.04.220, which reads as follows:

“Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor.”

Rem. Rev. Stat. §5818, R.C.W. 76.04.450, which reads as follows:

“All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they are or may be exposed by reason of the unusual quantity of fallen timber upon such lands.

It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire.”

All lands involved in the case at bar are within the area described in §5818.

Statutes dealing generally with the duties of land-owners and others with respect to forest protection are collected in Chapter 76.04 of R.C.W.

C. The Government had a duty under its contract with the State of Washington to fight and suppress this fire⁹. It is immaterial whether Rayonier could sue the Government under the contract; the Government's duty to use ordinary care extends to Rayonier.

65 C.J.S. 349, relied upon below by the Government, in fact supports Rayonier's position, as follows:

“ * * * there are two distinct principles which may be invoked to fix liability for an injury from negligence in the performance of a contract obligation. The law may impose duties additional to those specified in a contract or independent of it, and one may owe two distinct duties in respect of the same thing, one of a special character to a particular individual, growing out of special relation to him, and another of a general character to those who would necessarily be exposed to risks or danger or loss through the negligent discharge of such duty. Privity of contract is not necessary where the duty which was breached, although connected with the subject matter of a contract, was not cre-

⁹ Examine paragraph VI of amended complaint (R. 6-7).

ated by contract, as in a case where one who has been employed to perform certain work is guilty of such negligence in connection with the performance thereof as to cause injury to a person other than his employer, or where the thing dealt with is inherently dangerous; a *fortiori*, privity of contract is not necessary where there is no contract relation.

“The governing rule is that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it, and the nature and extent of the duty assumed by a person are factual matters to be established by proof of his actual conduct; and liability for negligence in the breach of this duty is in no way dependent on the existence of any privity of contract between the person guilty of the negligence, and the person suffering injury as a result thereof.”¹⁰

¹⁰This rule was approved by the United States Court of Appeals for the Ninth Circuit, in *Western Auto Supply Agency v. Phelan*, 104 F.2d 85 (9th Cir. 1939), and by the Washington Supreme Court in *Sheridan v. Aetna Casualty, etc., Co.*, 3 Wn.2d 423, 100 P.2d 1024 (1940). Prosser on Torts, page 206, §33, says:

“*Liability to Third Persons*

“The obligation of a contract runs only to the parties designated by the contract. If the defendant assumes a contract duty toward A, there is no logical basis upon which he may be compelled to perform that duty for B, unless the contract has been entered into expressly for the benefit of B, or A should happen to have assigned his rights. But by entering into the contract with A, the defendant may place himself in such

A private individual could have been party to a contract with the State of Washington similar to the above-mentioned contract to which the Forest Service was a party. Rem. Rev. Stat. §5784, R.C.W. 76.04.050, requires that the State Supervisor of Forestry "shall * * * co-operate in * * * forest fire fighting and patrol * * * with * * * the United States * * * and individuals within the state of Washington * * *." It is under authority of this statute that the state made the contract with the Forest Service. The Forest Service also is authorized to enter into such contracts, 16 U.S.C. §565.

D. Conclusion of Part II of Argument.

A duty was breached in each of the above respects, that is, under common law as a landowner and volunteer, under statutory requirements and under contractual requirements. A breach of any one of those duties would be adequate to support the claim. Even if this Court were to hold that any one or more of those duties did not exist, there would still be a claim if any one of them did exist and was breached.

The numerous breaches are described in the complaint (R. 26-29) and include knowingly permitting nuisance and fire hazardous conditions and practices on the Government's land, failure to prevent the fire, failure to contain and control the fire in each of its pre-

a relation toward B that the law will impose upon him an obligation to act in such a way that B will not be injured. The action is not upon the contract, since B is a stranger to it; but the existence of the contract does not negative the responsibility of the defendant when he enters upon a course of conduct which may affect the interests of others."

liminary stages and failure to pursue and extinguish the fire, all with full knowledge of the dangerous conditions and risks involved and having full means at the disposal of the Government's employees to eliminate or minimize the risks. Rayonier was damaged (R. 29-33), and such damage was proximately caused by breach of the Government's duty to Rayonier (R. 29).

Clearly, if it were a private person who owned the land and whose employees were guilty of the acts and omissions described in the complaint, that person would be liable to Rayonier under the allegations of the complaint and under the law and statutes of the State of Washington. To date, we do not understand Government counsel to contend otherwise. The District Judge, in his remarks from the bench in ruling on the motion directed to the original complaint, stated that in his opinion there would be a duty on the Government and a proper claim stated except for the Judge's interpretation of *Dalehite v. United States*, 346 U.S. 15, 97 L.Ed. 1427, 73 S. Ct. 956 (1953), and what he conceived to be governmental immunity under the *Dalehite* case because public employees were involved in fighting the fire (R. 41). The *Dalehite* case and the "public firemen" question are discussed later in this brief.

Part III.

Extent of Waiver of Sovereign Immunity

A. Immunity from tort liability is waived in sweeping language.

Congress has waived the sovereign immunity of the United States from liability for its torts by two sections of the Tort Claims Act. The broad waiver is limited only

by a third section. The sections waiving immunity are as follows:

28 U.S.C. §1346(b):

“Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”

The first paragraph of 28 U.S.C. §2674:

“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”

The courts have characterized the waiver of immunity as “clear and sweeping.” In language followed by the 6th Circuit¹¹ and approved by the Supreme Court,¹² this Court, the Ninth Circuit, construed the Tort Claims Act as follows:

“ * * * The words of the Act indicate a clear and sweeping waiver of immunity. * * *

¹¹ *Old Colony Insurance Co. v. United States*, 168 F.2d 931 (6th Cir. 1948).

¹² *United States v. Yellow Cab Co.*, 340 U.S. 543, 95 L. Ed. 523, 71 S.Ct. 399 (1951).

“The Government has premised its position largely on the principle that statutes in derogation of sovereign immunity must be strictly construed. Where a statute contains a clear and sweeping waiver of immunity from suit on all claims with certain well defined exceptions, resort to that rule cannot be had in order to enlarge the exceptions.

* * * ’13

In *United States v. Yellow Cab Co.*¹⁴ the Supreme Court reasoned that in a case where there is no immunity from suit *by* the Government, the Government should not be clothed with immunity from suits by others *against* the Government. In dealing with the Government’s contention for a construction of the statute that would have defeated the claim, the Court used the following language at page 554:

“In argument before a number of District Courts and Courts of Appeals, the Government relied upon the doctrine that statutes waiving sovereign immunity must be strictly construed. We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected by Judge Cardozo’s statement in *Anderson v. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30: ‘The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.’ ”

28 U.S.C. §§1346(b) and 2674 should be applied and interpreted in harmony with the present trend of legis-

¹³ *Employers’ Fire Ins. Co. v. United States*, 167 F.2d 655, 656, 657 (9th Cir. 1948).

¹⁴ See note 12, *supra*.

lative policy and of judicial thought the direction of which is toward abandonment of the doctrine of sovereign immunity. The enactment of the Federal Tort Claims Act is conspicuously indicative of this trend and, in view of the Federal Government's proprietary interests and its progressively larger involvement in business in competition with private individuals and corporations, the Act is conspicuously wholesome.¹⁵

The recent cases continue to adhere to the foregoing rules of statutory interpretation. In *Gilroy v. United States*, 112 F.Supp. 664, 665-66 (D. D.C. 1953), the District Court for the District of Columbia, speaking through Holtzoff, District Judge, interpreted the Act as follows:

"The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be liberally construed in order to effectuate the purpose that was intended by its framers. The words, 'as a private individual', are not used as words of art or as a limitation, but, rather, in a

¹⁵*United States v. Shaw*, 309 U.S. 495 at 501, 84 L.Ed. 888 at 892, 60 S.Ct. 659; *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 at 390, 391, 396, 397, 83 L.Ed. 784 at 789, 790, 793, 59 S. Ct. 516; *Federal Housing Administration v. Burr*, 309 U.S. 242 at 245, 84 L.Ed. 724 at 728, 60 S.Ct. 488; *Anderson v. John L. Hayes Construction Co.*, 243 N.Y. 140, 147, 153 N.E. 28. The latter case was cited with approval by this Court (9th Cir.) in *Employers' Fire Ins. Co. v. United States*, 167 F.2d 655 at 656 (9th Cir. 1948) mentioned above.

descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else.”

This quotation was approved by the Court of Appeals for the Third Circuit in *O'Toole v. United States*, 206 F.2d 912, 918 (3rd Cir. 1953), decided by Biggs, Chief Judge of the Third Circuit, August 10, 1953, two months after the decision in the *Dalehite* case, which is discussed later in this brief.

B. Limitations on waiver of immunity.

Having waived immunity from tort liability in clear and sweeping language, Congress then defined in §2680 the only limitations on the waiver. That section is quoted in full in the Appendix to this brief. Subsections (b) to (m), inclusive, are obviously not applicable to the case at bar. If any part of §2680 is to be applied, it must be found in subsection (a). We say that subsection (a) does not apply. The Government says it does.

Section 2680(a) reads as follows:

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

Analysis of subsection (a) shows that it deals with two different types of claim in which immunity is reserved.

1. *The first part of Section 2680(a).*

The first part of Section 2680(a) reads as follows:

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, *exercising due care*, in the *execution of a statute or regulation*, whether or not such statute or regulation be valid * * *.” (Italics are ours)

It is patent that the first portion is not applicable to the case at bar because, first, the employees of the Government of whose acts and omissions we complain were not exercising due care, and second, their acts and omissions were not in the execution of a statute or regulation.

Neither does this case challenge the validity of any statute or regulation.

Therefore, if any part of Section 2680(a) is applicable, it must be found in the second part.

2. *The second part of Section 2680(a).*

The second part of Section 2680(a) reads as follows:

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”

This part of Section 2680(a) calls first for the meaning of “discretionary function” and then for a determination of whether a discretionary function is involved.

There is evolving a line, still somewhat hazy, which

defines the area of discretionary function. So far as pertinent to the case at bar the area of discretionary function ends at the “*determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision * * *.*” *Dalehite v. United States, supra*. The Court then observed that, “It necessarily follows that *acts of subordinates* in carrying out the operations of government *in accordance with official directions* cannot be actionable.” In holding the Government not liable, the court said, “The decisions held culpable were all responsibly made at a *planning* rather than *operational* level and involved considerations more or less important to the practicability of the * * * program.” (Emphasis supplied.)

The quoted portions of the Supreme Court’s opinion summarize the conclusions and distinctions made by the Courts of Appeal and District Courts in the construction of this rather new legislation.¹⁶

But once the policy determination has been made and the plan has been established by the executives and administrators, liability attaches to the tortious acts and omissions of employees at the operational level, and if they fail to carry out the plan as directed, or if in carrying out the plan they act in a negligent manner not directed or specified by the plan, then the Government is liable.

Thus in the following cases where plans have been determined, approved and ordered executed, the Gov-

¹⁶See *Dalehite* opinion footnote 32 and cases hereinbelow cited.

ernment was held liable for tortious acts in the execution of the plan:

In *Smith v. United States*, 116 F.Supp. 801 (D. Dela. 1953), re-argued specially after the decision in the *Dalehite* case, and wherein it was held that the acts of subordinates which are done contrary to the plan or under no plan at all subject the Government to tort liability.

In *Ure v. United States*, 93 F.Supp. 779 (D. Ore. 1950), the Court acknowledged that the matter of planning and of constructing a large irrigation project is discretionary but that the operation of it after it has been completed and put into service does not involve a discretionary function.

See also the cases involving the malpractice of Government doctors in federal hospitals in which it is held consistently that the discretionary function is discharged upon the admission of the patient to the hospital and that thereafter the treatment of the patient is non-discretionary: *United States v. Gray*, 199 F.2d 239 (10th cir. 1952); *Costley v. United States*, 181 F.2d 723 (5th Cir. 1950); *Griggs v. United States*, 178 F.2d 1 (10th Cir. 1949); *Dishman v. United States*, 93 F.Supp. 567 (D. Md. 1950).

Other cases include the military plane crash cases wherein the pilot's obvious and unusual discretion is not considered the kind of discretionary function that will preserve the government from liability: *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953), decided after the *Dalehite* case; *United States v. Gaidys*, 194

F.2d 762 (10th Cir. 1952); *United States v. Kesinger*, 190 F.2d 529 (10th Cir. 1951).

See also: *DeBonis v. United States*, 103 F.Supp. 123 (W.D. Pa. 1952); *Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951); and *Oman v. United States*, 179 F.2d 738 (10th Cir. 1949).

Applying the foregoing principles to the case at bar, it is clear from the complaint that the acts and omissions complained of were at an operational level. We do not complain of the executive or administrative decision to enter into the agreement between the State of Washington and the Forest Service, nor the establishment of the Forest Service Fire Protective Area (R. 6-7), nor the establishment of the Fire Suppression Plan (R. 16), nor in the Government's decision to acquire, hold and operate lands and timber for pecuniary gain and profit (R. 5-6).

Our complaint is that employees at the operational level failed to observe or carry out those plans as conceived and established by the executives and administrators, and that to the extent they acted under such plans, they did so in a negligent manner. The District Ranger and his assistants had no choice or discretion as to whether they would or would not oversee the Government's lands or whether they would or would not supervise and participate in fire fighting activities; that was their job and their duty. They were lax and negligent in the performance of their job.

In *Smith v. United States*, 117 F.Supp. 525 (N.D. Calif. 1953), plaintiff was camping on a Forest Service Area campsite when a rotten limb of a tree fell on him.

The United States was held liable because the Forest Service Rangers had not discovered and removed the dangerous limb. The court said, page 528:

“Under the evidence it would appear that the defendant’s employees were under a duty of ordinary care to eliminate dangerous conditions in the campsite area. The testimony of these employees indicated that they recognized that duty and purported to perform it. It further appears that by reason of their experience they were in a position to have superior knowledge of the conditions and they either failed to use ordinary care in ascertaining the dangerous condition of the campsite area or failed to use ordinary care in removing such dangerous condition.”

From the foregoing, it is obvious that the second part of Section 2680(a) is not applicable because no discretionary function or duty is involved.

It is clear from the analysis so far made in this brief that (1) an individual in like circumstances would be liable for the acts and omissions complained of; (2) no part of 28 U.S.C. §2680 is applicable, and (3) if any sovereign immunity from these torts exists, it must be found outside the Federal Tort Claims Act. We thus come to consider the reasoning argued by Government counsel in the court below and expressed by the District Judge in granting the motion. This reasoning is premised wholly upon language used in part IV of the opinion in *Dalehite v. United States, supra*, which deals with the so-called “no analogous liability” theory, and with municipal immunity from liability for acts of public firemen. Neither of those theories is properly applied to the case at bar. Discussion of them follows.

Part IV

*Dalehite v. United States***No Analogous Liability Theory—Public Firemen Theory**

With reluctance and some misgivings (R. 37, 41, 55-57) the District Judge felt constrained to adopt the Government's argument and to dismiss the amended complaint because of the following language of the Supreme Court in *Dalehite v. United States*:¹⁹

“As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

“ ‘ * * * the liability assumed by the Government here is that created by “all the circumstances,” not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities.’ *Feres v. United States*, 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

“It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§1346 and 2674.

“The Act, as was there stated, limited United States liability to ‘the same manner and to the same extent as a private individual under like circumstances.’ 28 U.S.C. §2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immu-

¹⁹346 U.S. 15 at 43-44, 97 L.Ed. 1427 at 1444-1445, 73 S.Ct. 956.

nity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz v. Beacon*, 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease."

With due respect, we suggest that the quoted language was unnecessary to the *Dalehite* decision and that its implications will be discarded as precedent or authority in determining the Government's liability for torts.

It will be noted upon careful analysis that the above quote discusses two theories, neither of which is properly applied to the case at bar. One is the "no analogous liability" theory and the other is the principle of immunity of municipalities from liability for acts of municipally employed firemen. We discuss these points separately in this part of our argument.

A. The "no analogous liability" argument is inapplicable.

The "no analogous liability" argument is premised upon those portions of two statutes, 28 U.S.C. §§1346(b) and 2674, in which liability is imposed on the Government.

“ * * * under circumstances where the United States, *if a private person*, would be liable * * *.”
and

“ * * * in the same manner and to the same extent *as a private individual* under like circumstances * * *.” (Italics supplied)

The *Dalehite* opinion quotes from *Feres v. United States*,²⁰ and then proceeds from the *Feres* quotation.

The language of the court in the *Feres* case must be read in the light of the facts of that case. In the *Feres* case, the plaintiffs were members of the Armed Forces on active duty and not on furlough, and were damaged by other members of the Armed Forces likewise on active duty and acting in the line of duty. Traditionally, since the maintenance and operation of a national army is governmental in its purest sense, the law has always held that no member of the Armed Services on active duty may recover from the Government for negligence of others in the Armed Services on active duty. No private person could lawfully raise and maintain an army and hence no private person could lawfully be under like circumstances. Hence the above quotation from the *Feres* case is not inappropriate as applied to the facts in that case, for there could be no parallel or like circumstances.

But that is a far cry from a situation which involves Government employees at an operational level carrying out their duties in a proprietary activity of the Government and for whose acts there is commonplace, analogous, private and civilian activity and liability.

To apply the *Feres* quotation indiscriminately would

²⁰ 340 U.S. 135, 142, 95 L.Ed. 152, 158, 71 S.Ct. 153.

almost nullify the Tort Claims Act in its entirety. For example, private persons do not and cannot own and operate a Post Office Department truck, yet the classic example given as one of the tortious acts of a Government employee for which the Government should be liable is an automobile accident involving a postal truck. Neither could a private individual own and operate military aircraft,²¹ military combat vehicles,²² a Coast Guard signal tower,²³ or an Air Force base.²⁴ Yet the Federal Government has been held liable for tortious acts of its employees in the performance of their duties in each such case.

Congress did not intend that immunity from liability be retained in situations where, simply from the nature of things, a private individual is not likely to be engaged in the same occupation. On the contrary, the Tort Claims Act says that if a private individual could be and were guilty of the same acts and omissions as those of the Federal employee complained of (regardless of whether the private person is likely to be doing those things), then the Federal Government will answer for torts of its employees. This intent has been recognized where the Government has been held liable under situations where a private person, acting in a private capacity, could not possibly be in an identical position,

²¹*United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953).

²²*O'Toole v. United States*, 206 F.2d 912 (3rd Cir. 1953).

²³*McGill v. United States*, 200 F.2d 873 (3rd Cir. 1953).

²⁴*Smith v. United States*, 116 F.Supp. 801 (D. Dela. 1953).

e.g., the shooting of a civilian by an Army guard,²⁵ the shooting of a civilian by a Federal border police guard,²⁶ torts by agents of the Federal Alcohol Tax Unit,²⁷ negligent or wrongful acts or omissions of Federal CAA employees,²⁸ the failure of the Navy to properly buoy a wreck.²⁹

Sections 1346(b) and 2674 require the presumption that a private person could be performing many acts which, by their nature, and which, because of the many ramifications of our Government's activities, are not and for a long time have not been commonly engaged in by private persons.

There is nothing novel or unprecedented about the liability of a landowner under the law and statutes of the State of Washington for negligent acts and omissions of its employees.³⁰ There is nothing novel or unprecedented about the Government or its subdivisions being held liable for the unsafe condition of Government-owned property. There is nothing novel or unprecedented about Government liability for fires starting on Government-owned property.

²⁵*Cerri v. United States*, 80 F.Supp. 831 (N.D. Cal. 1948).

²⁶*United States v. Stewart*, 201 F.2d 135 (5th Cir. 1953).

²⁷*DeBonis v. United States*, 103 F.Supp. 123 (W.D. Pa. 1952). The government escaped liability on another ground.

²⁸*Union Trust Co. of District of Columbia v. United States*, 113 F.Supp. 80 (D. D.C. 1953).

²⁹*Somerset Seafood Co. v. United States*, 193 F.2d 631 (4th Cir. 1951).

³⁰See our Argument, part II, *ante*.

In the following cases the courts have recognized that as a landowner or proprietor the United States had liabilities parallel and analogous to the liabilities of private landowners and proprietors:

Chesapeake & Ohio Railway Company v. United States, 139 F.2d 632 (4th Cir. 1944), where the United States, suing a private party, recovered fire fighting costs by virtue of the fact that it was a landowner.

Ure v. United States, 93 F.Supp. 779 (D. Ore. 1950), where the court used the following language in speaking of federal operation of an irrigation system:

“A private person would be held upon the common law doctrine of trespass and upon the public policy which underlies the statute and the decisions of the Oregon Supreme Court. Under these circumstances, there is no reason why the United States should not be liable under the enactment subjecting the Government to tort liability.”

Reconstruction Finance Corporation v. Childress, 186 F.2d 698 (8th Cir. 1950), where the court approved the following language:

“If it [the government] comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there. * * * Generally, in respect to all the commercial business of the government, if an officer specially charged with the performance of any duty, and authorized to represent the government in that behalf, neglects that duty, and loss ensues, the government must bear the consequences of his neglect.”

Ellison v. United States, 98 F.Supp. 18 (D. Nev. 1951), where the Federal Government, as the owner of

ranch lands in Nevada, was guilty for its wrongful diversion of waters.

Brewer v. United States, 108 F.Supp. 889 (M.D. Ga. 1952), where the Government as owner and operator of an Air Force base swimming pool was held to the same standard of care as private swimming pool proprietors.

Smith v. United States, 116 F.Supp. 801 (D. Dela. 1953), where a defective draining system in an Air Force installation damaged the lessee of lower riparian land and the United States was held liable in a manner analogous to and parallel with private upper riparian owners.

Bowden v. United States, 200 F.2d 176 (4th Cir. 1952), where the Government was sued on the theory that as the owner of land, on which there were located a Naval Air Station and an installation of the National Advisory Committee on Aeronautics, it had liabilities analogous to and parallel with those of a private landowner. The plaintiff did not succeed in recovering from the Government only because he failed to prove negligence as a matter of fact, not because his theory of recovery was invalid as a matter of law. See also *United States v. Bowers*, 202 F.2d 139 (5th Cir. 1953), where the court expressly assumed that the theory of liability founded upon proprietary duties analogous with and parallel to those of private landowners was valid under the Act.

McGill v. United States, 200 F.2d 873 (3rd Cir. 1953), where the Coast Guard was held liable for the death of a child who fell from an abandoned signal or watch

tower located on the real property owned by a New Jersey municipality but controlled by the Coast Guard.

State of Maryland, for Use of Pumphrey v. Manor Real Estate & Trust Co., 176 F.2d 414 (4th Cir. 1949), where the Government as owner and operator of an apartment house development was held responsible for the condition of the premises caused by rats.

Smith v. United States, 117 F.Supp. 525 (N.D. Calif. 1953) where the United States was held liable to a camper in Forest Service campsite for injuries caused by dead branch falling from tree.

As a final test of the "no analogous liability" theory in the case at bar, let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier the defendant, and that the conditions, acts and omissions described in the complaint were those created, tolerated or committed by Rayonier and its employees. It would enlighten this Court and us if Government's counsel would state whether there is any reason in fact or in law why the position of the parties could not be transposed in all material respects, and whether Rayonier would be liable to the United States. If the situation could be so transposed, and if Rayonier would be liable, then there can be no question but that in the case at bar there is analogous and parallel liability to meet any test that might be suggested under this theory.

Of significance and enlightenment is the case of *Bloedel Donovan Lumber Mills v. United States*, 74 F.Supp. 470 (Ct. Cl. 1947), decided by the Court of Claims on December 1, 1947, *certiorari* denied without opinion,

335 U.S. 814, 93 L.Ed. 369. In that case the plaintiff was awarded damages caused by fire which was set to burn slash at the direction of the same District Ranger Floe who is involved in the case at bar. Almost nine years to the day prior to the fire involved in our case, Ranger Floe insisted that a slash fire be set in this same general area under very similar weather conditions and in the face of similar wind and weather forecasts. His decision there was in the performance of his job as District Ranger and was just as much of a governmental and discretionary function as his job in the case at bar. Certainly if it had been felt that his act was in performance of a governmental or discretionary function, or if there was no analogous liability, or if this were a novel or unprecedented liability, the court would not have found for the plaintiff. Instead, the court said, page 477:

“Naturally the defendant could not be held liable for ordinary mistakes or errors of judgment. These are inevitable. But viewing all the evidence and circumstances we cannot escape the conclusion that the action of Floe was either arbitrary or negligent and that defendant is responsible for the damages that reasonably could have been foreseen as the natural and probable result of the action taken.”

B. The doctrine of municipal immunity from liability for acts of municipally employed firemen is not applicable.

The portion of the *Dalehite* decision quoted at the beginning of part IV of our Argument suggests that there should be extended to the Federal Government the same immunity from liability for acts of public firemen as exists under municipal law by which municipalities are

immune from liability for negligence of municipal firemen. We submit that any such pronouncement is *dictum*, is inept under the Federal Tort Claims Law, and in any event may not be applied to the facts and circumstances in this case.

1. *Facts in the Dalehite case indicate that "public firemen immunity" is not properly involved.*

As we get the facts of the *Dalehite* case from the reported opinions and from the briefs filed in the Supreme Court, the negligence complained of, so far as fire hazards and fire fighting activities are concerned, is generally as follows: Negligence was asserted in the plans and specifications adopted at policy-making and administrative levels for carrying out the Foreign Aid Program and the manufacture and distribution of fertilizer pursuant thereto. The Court held such negligence to be within the discretionary function exception, having been committed at executive or administrative level. The Coast Guard was asserted to have been negligent in failing to hunt for and discover the improper loading and storing aboard vessels of the explosive fertilizer which ultimately broke into flame, and in failing to do anything about fighting the fire after it started. From the facts appearing and from the arguments of Government counsel in their Supreme Court brief, it seems there could not have been negligence on the part of the Coast Guard, because one of the essential elements of actionable negligence was missing, namely, a duty. The property and ships involved were not owned by or subject to the control of the Government.³¹ The

³¹ *Dalehite v. United States*, 346 U.S. 15 at 22, 97 L.Ed. 1427 at 1434, 73 S.Ct. 956.

places where the ships were docked and loaded and caught fire were not under the supervision or jurisdiction of the Government. The fire prevention measures and the fire fighting activities complained of were under the supervision, direction and control of the local authorities and not of the Coast Guard or Federal Government. There was no statutory or regulatory duty imposed upon the Coast Guard which was unperformed. The Coast Guard's functions and participation were all intended to be permissive and not compulsory. Hence, there was no duty on the Coast Guard which would support an action for negligence.³² For these reasons it was unnecessary for the Court to call upon principles of municipal law to support its ruling in favor of the Government.

2. *The principle of municipal immunity from liability arising out of governmental functions, including fire fighting, should not be extended to the Federal Government.*

In the *Dalehite* case, the Supreme Court said:

“ * * * in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. * * * That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. * * * ”

Government's counsel argued, and the District Judge reasoned, on the strength of that quotation, that since

³² Supreme Court brief of the Government in *Dalehite v. United States*, *supra*, pp. 167-170, pp. 203-4. See also Petitioner's Supreme Court brief, pp. 232-236, and Petitioner's reply brief, p. 18.

the Forest Service employees were hired by the Government they were public employees and since some of the acts complained of were in connection with fire fighting, they were firemen, and hence public firemen; therefore—no liability on the Federal Government (R. 38-39).

Nowhere does the Tort Claims Act say that federal immunity shall be the same as or similar to the immunities of communities and cities. Section 2680 lists numerous acts and functions for which immunity from liability is expressly reserved to the Government. Some of those would normally be characterized as “governmental” functions if they concerned municipalities. If Congress had intended that immunity be retained in all instances where it exists in municipal law it would have said so in Section 2680, or it would have included in Section 1346(b) language somewhat as:

“where the United States, if a private person *or a municipal corporation*, would be liable * * *.”

The deliberate care with which the Federal Tort Claims Act was drafted and the experience which lay in other legislation which expressly waives federal immunity, preclude any possibility of inadvertent omission of a “governmental function” or “public firemen” immunity provision. The waiver of immunity is broad. The retention of immunities is specific. The liability of the United States is the same as that of an individual under like circumstances. The Supreme Court has said that the Federal Tort Claims Act

“ * * * suggests no reasons for reading into it fine distinctions between various types of such claims.”³³

³³*United States v. Yellow Cab Co.*, 340 U.S. 543, 95 L.

In *Somerset Seafood Co. v. United States*, 193 F.2d 631, (4th Cir. 1951), at 635, the court said:

“(4) It is suggested that it was not intended to impose liability on the United States for damages arising out of the exercise of what are essentially ‘governmental’ functions as distinguished from those which might be carried on by private individuals, but we think that there is no basis for such distinction. As was said by Judge Roche in *Cerri v. United States*, D.C. N.D. Calif., 80 F.Supp. 831, 833: ‘The defense that this act does not apply to those cases wherein the negligence occurred during the exercise of a sovereign power of the United States, if heeded, would create a twilight zone of governmental activities in which the consent given by this statute could not be applied. Too numerous are the affairs of a purely governmental or sovereign nature, prohibited to or not duplicated by the activities of private individuals, to consider this to be the intent of Congress. Certainly, the statute itself makes no distinction between governmental activities of a sovereign nature and those of a proprietary nature, nor does it include within the claims exempted, 28 U.S.C.A. §943 (under revision of 1948, 28 U.S.C.A. §2680), those of this type.’

“The case is favorably discussed by Judge Yankwich in 9 F.R.D. 143, at page 156 where he says: ‘In this respect, the opinion accords with the latest decisions of the Supreme Court which do not rec-

Ed. 523, 71 S.Ct. 399 (1951). In *Cerri v. United States*, 80 F.Supp. 831 (N.D. Cal. 1948), in holding the government liable for negligent shooting of a civilian by an Army guard, the court refused to recognize a distinction between sovereign and proprietary functions because the Tort Claims Act makes no such distinction.

ognize in the law of public liability of the United States the distinction between governmental and other capacities. This was put very pithily by Mr. Justice Frankfurter in a well-known case: "Government is not partly public or partly private, depending upon the governmental pedigree of the type of a particular activity or the manner in which the Government conducts it." *Federal Crop Ins. Corp. v. Merrill*, 1947, 332 U.S. 380, 383, 68 S.Ct. 1, 92 L.Ed. 10.' And in *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381, 391, 59 S.Ct. 516, 518, 83 L.Ed. 784, the Supreme Court, in holding that a governmental corporation's liability to suit is not to be inferred from whether it is or is not doing the government's work, said: 'Congress has provided for not less than forty of such corporations discharging governmental functions, and without exception the authority to-sue-and-be-sued was included. Such a firm practice is partly an indication of the present climate of opinion which has brought governmental immunity from suit into disfavor, partly it reveals a definite attitude on the part of Congress which should be given hospitable scope.' "

3. *Even if the principle of municipal immunity for acts of public firemen extends to the United States, such immunity does not exist as to the case at bar.*

Even if there be federal immunity based on "governmental" function as such, and hence, immunity from liability for acts of public firemen acting in performance of a governmental function, that is immaterial here for several reasons: (a) the Forest Service employees were not firemen; (b) its employees were not performing a governmental function but rather were engaged in a

“proprietary” function; (c) even if they were performing a governmental function, the United States still had a duty as landowner to fight, pursue and extinguish fire originating on its lands, and it is immaterial whether its failure to do so is the result of acts and omissions of public firemen or otherwise; and (d) the bases of liability alleged include unlawful, improper and negligent conditions and practices on Government lands prior to the time fire occurred and before firemen as such became involved.

(a) *The Forest Service employees were not firemen.*

The District Ranger and his subordinates, of whom complaint is made, were caretakers of the Government lands involved. As such caretakers, their duties were many and varied, and included carrying out of forestry practices, observation and inspection of road construction and logging operations in timber being purchased from the United States, checking on hunters, fishermen and recreationists, giving information to the public and to persons interested in the district and its many features and activities, and in general acting as caretakers of the Government's land (R. 8). Their duties also required that they inspect and patrol the lands and other lands within the Forest Service Protective Area to discover, abate and eliminate conditions thereon which constituted fire hazards, to watch for the outbreak of fire, and when fire occurred within the area, to fight and use every reasonable effort to control and extinguish the same (R. 9). The Government did not own, maintain or operate a fire department or fire fighting organization as such in this area, but, just as

other owners and operators of timber and timberlands in the area, had men and equipment available to fight fires and knew where additional men and equipment to fight fires could readily and quickly be obtained (R. 17).

The janitor or custodian of any public building, or of any state or municipal liquor warehouse, or of a municipal carbarn, or of the restrooms provided for excursionists at the City of Seattle's Diablo Dam power development, should be alert to fire and fire hazardous conditions on the property in his custody. Is he for that reason a fireman? If fire breaks out in a waste basket and the custodian grabs the fire extinguisher and puts out the blaze (or fails to put it out), is he yet a fireman? Does the fact that a fire extinguisher hangs on the wall make him a fireman or the establishment a fire department? Does the frequency of fires have a bearing on the question? (The Court will take judicial notice, we believe, that forest fires do not occur very often.) It strains one's imagination and mental processes to say that a caretaker is a fireman or public fireman simply because his duties include good housekeeping and normal attention to fire danger when it occurs.

(b) The Forest Service employees were engaged in proprietary function of the Government.

The Government lands on which the fire hazardous conditions and practices complained of existed, and in the Fire Protective Area for which the Forest Service employees were caretakers, were owned and operated by the Government for pecuniary gain and profit, and the timber thereon was held, managed, operated and administered upon to be sold to private parties for

cutting for industrial and commercial purposes, and for pecuniary gain and profit to the Government.

If, under or in spite of the Federal Tort Claims Act, it is proper to extend municipal law and the immunities thereunder to the Federal Government, then it is equally proper and logical to recognize the distinction made by municipal law between governmental and proprietary functions and the exceptions to municipal immunity from liability, which exceptions are just as "doctrinally sanctified" as the governmental immunity rule itself.

The law of municipal corporations and their liabilities has grown throughout the years under the peculiar wording of various state statutes and municipal charters, and under the doctrine of *stare decisis* peculiar to each jurisdiction, and through application of public policy peculiar to various geographical areas. What is doctrinally sanctified under the law of municipal corporations in any state is not, *ipso facto*, sanctified under the Federal Tort Claims Act to preserve federal immunity that Congress has abrogated in very sweeping terms. We have found no state statute waiving immunity which itemizes with such particularity the *sole* circumstances under which the immunity of the municipality or of the state will be preserved such as we find in the Federal Tort Claims Act.

The Supreme Court in the *Dalehite* case was cognizant of the exceptions to the general common law rules because the case of *Steitz v. Beacon*, 295 N.Y. 51, 64 N.E.2d 704, 163 A.L.R. 342, which it cites, clearly

recognizes an exception to municipal immunity doctrinally sanctified in New York.

The introductory paragraph of Section 746 on Municipal Corporations, 63 C.J.S. 29, states the general rule as follows:

“Although the doctrine is repudiated by some authorities, generally a distinction is made between the public or governmental functions of a municipal corporation on the one hand, and the private, corporate, or proprietary functions on the other; and liability is generally imposed for torts committed in the exercise of the latter functions, but not for those committed in the exercise of the former.”

That section then goes on to state that some authorities hold all functions of a municipal corporation are of a public or governmental nature, for which the municipality is not liable in tort, and other authorities hold that a municipal corporation should be liable for its torts regardless of the nature of the function involved. It then states that the great weight of authority holds as stated in the above quotation.

Further citation of authority seems unnecessary. With few exceptions, negligence occurring in a proprietary functions is actionable. Even beyond that, municipal liability is not uncommon in negligence cases arising out of governmental or semi-governmental activities, as for example, liability for unsafe street conditions, water system failures, sewage and drainage defects, and automobile accidents where the automobiles are engaged in various pursuits. The extent of liability and immunities therefrom are frequently influenced or controlled by local statutes, charters and ordinances.

Municipal liability varies from state to state and is subject to statutory and judicial modification. Even within one state, as in the State of Washington, there may be variations in liabilities and immunities of different classes of municipal corporations and political subdivisions. For example, in Washington there is in effect the following statute, Rem. Rev. Stat. §951, RCW 4.08.120:

“§951. *Actions against public corporations.* An action may be maintained against a county, or other of the public corporations mentioned or described in the preceding section [county, incorporated town, school district or other public corporation of like character in this state] either upon a contract made by such county or other public corporation in its corporate character, and within the scope of its authority, or for an injury to the rights of the plaintiff arising from some act or omission of such county or other public corporation. (L. 69, p. 154, §602; Cd. '81, §662; 2 H.C. §672).”

This statute has been interpreted so that it is now inapplicable to cities, but the waiver of immunity with respect to counties, even in their performance of governmental functions as distinguished from proprietary functions, has been affirmed in *Whiteside v. Benton County*, 114 Wash. 463, 195 Pac. 519 (1921).

We observe parenthetically that the confusion and uncertainty as to tort liability of the United States which would necessarily result from extension of principles of municipal law, is another sound and solid reason why the Federal Courts should adhere strictly to the wording of the Federal Tort Claims Act.

- (c) *The United States had a duty as landowner to fight, pursue and extinguish fires originating on its lands. That duty is unaffected by the acts or omissions of public firemen.*

The Washington statutes and general law imposing duties and obligations on landowners are discussed in Section B of Part II of this Argument, *ante*.

If the United States has duties as a landowner, those duties must be discharged, and failure to perform them gives rise to liability. It does not matter if the unlawful or negligent condition of the property is the result of an act or omission performed, tolerated or created in the exercise of a governmental function.

See:

Sprague v. City of St. Louis, 251 Mo. 624, 158 S.W. 16 (1913), where the city was held liable when plaintiff was injured by stumbling over a water hose in the street, which hose was being used by city employees in washing one of its sewers, a governmental function.

Hillstrom v. City of St. Paul, 134 Minn. 451, 159 N.W. 1076 (1916), where the city was held liable as a proprietor for the death of a boy caused by the falling of a rotted pole, the exclusive purpose of which was to support a fire alarm system, a governmental function.

State v. City of Marshfield, 122 Ore. 323, 259 Pac. 201 (1927), where the State of Oregon recovered from the city the cost of fighting a forest fire which had its origin upon city lands.

Crandall v. City of Amsterdam, 280 N.Y. 527, 19 N.E.2d 926 (Court of Appeals, New York, 1939), affirming *per curiam* 254 App. Div. 39, 4 N.Y.S.2d 372, where the city was held liable for personal

injuries when plaintiff fell on an icy sidewalk, which ice was created by water being played on a fire by city firemen.

Osborn v. City of Whittier, 103 Cal. App.2d 609, 230 P.2d 132 (1951), where the city was held liable for damage from fire spreading from a garbage dump, even though dumping and burning of garbage was a governmental function.

(d) *The Government is liable because of unlawful, improper and negligent conditions and practices on Government lands prior to the outbreak of fire.*

The statutes and law of the State of Washington concerning fire hazardous and fire prevention conditions and practices on lands was discussed in Section B of Part II of this Argument, *ante*. The Government lands on which the fire originated on August 6, 1951, had for a number of years prior thereto been covered with trees of various sizes, standing and down, accumulations of rotten ties, logging and land clearing debris, and inflammable growing grasses and bushes (R. 11-12). This was contrary to the statutes cited. The Government knowingly permitted the Port Angeles Western Railroad to operate defective equipment over Government lands and not to have its trains followed by a speeder or other equipment with men watching for fires (R. 11-13). This was contrary to the statutes cited. The fire would not have started except for those fire hazardous conditions and practices, and the same were a direct and proximate cause of all events which followed, including damage to Rayonier's property (R. 29). Prior to noon on August 6, 1951, there was no fire fighting and there were no firemen involved. The most that can

be said was that the District Ranger and his subordinates, who at times donned firemen's hats, failed to abate the hazardous conditions and practices, but that could be no excuse for avoiding the Government's obligations and responsibilities as a landowner.

CONCLUSION

The United States Government is big and getting bigger. Whether we like it or not, it is increasingly active in business and industry and commerce. Its activities are often in direct competition with private enterprise and enter into and affect the flow of commerce. Government employees have jobs and duties and functions identical to those of employees of private concerns and they make the same mistakes and cause like injury.

It was in this climate of participation by Government that the Federal Tort Claims Act evolved. There was and is a definite need for it by every legal, political, economic, humane and just standard of this country. If Government elects to hold its lands and timber and to operate them for purposes of profit, then the Government should be held to the same rules of conduct and the same standards of responsibility as are exacted of its citizens who are in the same business. And a Government employee should have no license to be careless or negligent simply because he is a public rather than a private servant. If one's toe is stepped on, it hurts just as much whether the trespasser draws his paycheck from the Government or from General Motors. Fire burns with the same devastation whether it starts on one side of a section line or the other.

Recognizing the deteriorating effect on personal con-

duct which immunity from liability tends to create, and recognizing the unfairness to citizens who were left without recourse for damage caused by the United States and its employees while carrying on activities similar to those carried on by citizens, Congress passed the Tort Claims Act, thereby intending to put the Government on a parity with its citizens. The courts would do a grave injustice both to Congress and to the citizens if they inject into the law immunities which are not clearly and specifically retained by the statute.

In the case at bar, the Government owns lands and timber just as do Rayonier and other private parties in the area. The Government manages and operates that land and timber for profit just as do the private owners (R. 5-6). It has employees to look after that timber just as do private owners, and its employees go about their work doing the same chores and having the same opportunities for doing a good, bad or indifferent job as employees of private owners (R. 8-10). Forest Service employees and private employees work shoulder to shoulder, so to speak, because Forest Service timber and private timber are intermingled, and what is good or bad for one stand of timber is equally good or bad for the other timber in the area.

Whether it was a matter of expediency or policy, it so happens that the Forest Service committed itself to take charge in case of fire (R. 6-7). If the Forest Service had not done so it could have been Rayonier or some other company or an association of private timber owners which undertook that responsibility, as both State and Federal agencies are authorized by statute to

make arrangements with private parties as well as with State and Federal authorities to set up fire protection procedures. 16 U.S.C. §565; Rem. Rev. Stat. §5784; R.C.W. 76.04.050. The Fire Suppression Plan of the Forest Service was similar to that which most private owners establish for themselves, for private owners recognize the primary responsibilities which attach to them as owners and the losses which they will sustain if fire occurs on their property. All such plans recognize the inadequacy of the men and equipment of just one party to cope with a major fire, but they contemplate the co-operation of neighbors to furnish men and equipment to fight the common enemy (R. 16-17). That practice is common in the industry, and the Government in this case is a part of that industry.

This case should be a clear and simple one, where Rayonier is holding its neighbor responsible and accountable for failing to conduct itself in the same manner as the neighbor expects Rayonier to act, and for which the neighbor would look to Rayonier for redress, were the situations reversed.

We respectfully suggest that the District Court erred in dismissing the amended complaint, and ask the Court of Appeals to reverse the order appealed from.

Respectfully submitted,

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

APPENDIX A
28 U.S.C. §2680

“§2680. *Exceptions.*

“The provisions of this chapter and section 1346(b) of this title shall not apply to—

“(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

“(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

“(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

“(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

“(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

“(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

“(g) Repealed. Sept. 26, 1950, c. 1049, §13(5), 64 Stat. 1043.

“(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.

“(i) Any claim for damages caused by the fiscal op-

erations of the Treasury or by the regulation of the monetary system.

“(j) Any claim arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war.

“(k) Any claim arising in a foreign country.

“(l) Any claim arising from the activities of the Tennessee Valley Authority.

“(m) Any claim arising from the activities of the Panama Canal Company. As amended Sept. 26, 1950, c. 1049, §§2(a), 13(5), 64 Stat. 1038, 1043.”

16 U.S.C. § 565

“§565: Co-operation by Secretary of Agriculture with State officials in protection of timbered and forest-producing lands from fire; limitation on amount of expenditures by United States.

“If the Secretary of Agriculture shall find that the system and practice of forest-fire prevention and suppression provided by any State substantially promotes the objects described in section 564 of this title, he is hereby authorized and directed, under such conditions as he may determine to be fair and equitable in each State, to co-operate with appropriate officials of each State, and through them with private and other agencies therein, in the protection of timbered and forest-producing lands from fire. In no case other than for preliminary investigation shall the amount expended by the Federal Government in any State during any fiscal year, under this section, exceed the amount expended by the State for the same purpose during the same fiscal year, including the expenditures of forest owners or operators which are required by State law or which are made in pursuance of the forest-protection system of the State under State supervision, and the Secretary of

Agriculture is authorized to make expenditures on the certificate of the State forester, the State director of extension, or similar State official having charge of the co-operative work for the State, that State and private expenditures as provided for in this section have been made. In the co-operation extended to the several States due consideration shall be given to the protection of watersheds of navigable streams, but such co-operation may, in the discretion of the Secretary of Agriculture, be extended to any timbered or forest-producing lands or watersheds from which water is secured for domestic use or irrigation within the co-operative States. As amended July 25, 1947, c. 327, §1, 61 Stat. 449."

APPENDIX B

Washington Statutes Involved

Rem. Rev. Stat. § 2523; RCW 76.04.220:

“Negligent fires. Every person who shall wilfully or negligently set, or fail to carefully guard or extinguish any fire, whether on his own land or the land of another, whereby the timber or property of another shall be endangered, or who shall fail to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor.” (L. '09, p. 974, § 271.)

Rem. Rev. Stat. § 5647; RCW 4.24.040:

“Damages for negligently permitting fire to spread. If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage.” (L. '77, p. 300, § 3; Cd. '81, § 1226.)

Rem. Rev. Stat. § 5649; RCW 4.24.060:

“Common-law rights not abrogated. The common-law right to an action for damages done by fires is not taken away or diminished by this act, but it may be pursued notwithstanding the fines or penalties set forth in sections 5651 and 5652; but any person availing himself of the provisions of section 5647 shall be barred of his action at common law for the damage so sued for and no action shall be brought at common law for kindling fires in the manner described in the last section; but if any such fires shall spread and do damage, the person who kindled the same and any person present and concerned in driving such lumber, by whose act or neglect such fire is suffered to spread and do damage, shall be

liable in an action on the case for the amount of damages thereby sustained." (L. '77, p. 300 § 6; Cd. '81, § 1229.)

Rem. Supp. 1941 § 5794; RCW 76.04.250, RCW 76.04.260, RCW 76.04.270:

"Closed season—Operating of locomotive, gasoline engines, etc.—Spark arrestors—Fire fighting equipment—Common carrier railroad companies—Patrols—Penalties. It shall be unlawful for anyone to operate within one-quarter ($\frac{1}{4}$) of one (1) mile of any forest area during the closed season:

(a) Any spark-emitting railroad logging locomotive, logging or farming engine or boiler or any spark-emitting locomotive, without such railroad or logging locomotive being equipped with and uses a safe and suitable device for arresting sparks, a suitable power pump of not less than 3" x 2" x 3" with discharge air chamber, or equivalent pump, three hundred (300) feet of hose not less than one (1) inch in diameter equipped with a standard nozzle, three (3) axes, six (6) shovels, one (1) five (5) gallon hand pump, two (2) bucking saws and six (6) mattocks or the serviceable equivalent to such tools. The hand equipment must be kept in a sealed box, ready for instant use on or adjacent to such locomotive, logging engine or farm engine: *Provided*, That no such railroad locomotive, logging or other engine or boiler shall be operated by anyone without being equipped with adequate device to prevent the escape of fire or live coals or other burning substance from all ash pans, and all fire boxes, except when ash pans or fire boxes are being cleaned when not in motion. Any donkey boiler, when equipped to operate without the use of exhaust steam within the stack, and without any artificial means of creating a forced draught, shall not require a spark arrestor;

"(b) Any gasoline or diesel yarding, skidding, or

loading engine, unless such yarding, skidding, or loading engine is provided with two (2) chemical fire extinguishers of not less than one-half ($1\frac{1}{2}$) gallon capacity each, three (3) axes, six (6) shovels, one (1) five (5) gallon hand pump, two (2) bucking saws, and six (6) mattocks or the serviceable equivalent to such tools. The hand equipment must be kept in a sealed box ready for instant use on or adjacent to such yarding, skidding, or loading engines;

“(c) Any tractor, unless such tractor is equipped with a chemical fire extinguisher of not less than one (1) quart capacity;

“(d) Any truck hauling forest products from any forest area, unless such truck is equipped with a chemical fire extinguisher of not less than one (1) quart capacity, one (1) axe and one (1) shovel;

“(e) Any gasoline or diesel engine, unless such engine has the exhaust pipe outlet pointed upward to a minimum angle of forty-five (45) degrees from the horizontal or is equipped with a suitable device for arresting sparks.

“All logging locomotives shall be equipped with a sprinkler system which shall be capable of wetting the tracks and at least two (2) feet on either side of each rail. Such sprinkler system shall be manually controlled from the cab. The water supply tank for such sprinkler shall be capable of carrying an adequate supply of water in direct relation to the mileage of track covered and the available water supply.

“It shall be unlawful for common carrier railroad companies to operate trains through forested districts unless such trains are followed by a speeder patrol at such times and in such places as the State Supervisor of Forestry may designate, each patrol to be equipped with a five (5) gallon fire extinguisher, two (2) shovels

and an axe. In case a railroad company fails to provide patrol as required, the State Supervisor of Forestry is hereby authorized to employ patrolmen for such purpose and the railroad company concerned shall be liable for the expense of the same to be collected in a civil suit brought by the state against said railroad company.

“It shall be unlawful for any logging locomotive to operate through a hazardous fire-area, consisting of unburned slashings, during any period of fire weather unless the movements of such locomotives are followed by a speeder or other patrol. Where speeder patrol is used, such speeder shall be equipped with two (2) shovels, one (1) axe, and a one (1) five (5) gallon hand tank pump filled with water.

“Every person violating the provisions of this section shall upon conviction be punished by a fine of not less than twenty-five dollars (\$25), nor more than seventy-five dollars (\$75) and the judgment of the court, in case of conviction, shall prohibit such person from operating such train, railroad locomotive, logging locomotive or other engine or boiler until the requirements of this section have been complied with.” (Am. L. '41, ch. 63, § 1.)

Rem. Rev. Stat. § 5795; RCW 76.04.280:

“*Railroads—Fire on right of way.* No one operating a railroad shall permit to be deposited by his, or its, employees, and no one shall deposit during the closed season, fire or live coals upon the right of way outside of the yard limits, and within one-quarter of one mile of any forest material, without such deposit of fire or live coals shall be immediately extinguished.

“Anyone violating the provisions of this section respecting the deposit of fire or live coals, shall upon conviction pay a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100) or be

imprisoned in the county jail not exceeding thirty (30) days.

“Wardens and rangers shall report any lack of sufficient spark-arrestors, and any lack of adequate devices for preventing the escape of fire and live coals, as provided in this act, to the forester, and to the prosecuting attorney of their county, and the superior court of that county where suit is first instituted, shall have jurisdiction of the offence.” (L. '11, p. 634, § 15.)

Rem. Rev. Stat. § 5795-1; RCW 76.04.290:

“*Public carriers—Report of fires.* Railroad companies and other public carriers, or any person or persons, operating through forested districts, must report forthwith by telephone or telegraph any fires on or adjacent to their right of way or route, to the local fire-warden or to the office of the state supervisor of forestry.” (L. '23, p. 622, § 7.)

Rem. Rev. Stat. § 5796; RCW 76.04.310:

“*Burnings on right of way—Permits—Public work.* Everyone clearing right of way for railroad, public highway, private road, ditch, dike, pipe or wire line, or for any other transmission, or transportation utility right of way, shall pile and burn on such right of way all refuse, timber, brush and debris cut thereon, as rapidly as the clearing or cutting progresses, or at such other times as the forester, or his authorized representatives may specify, and if during the closed season, in compliance with the law requiring burning permits. No one clearing any land or right of way, or in cutting or logging timber for any purpose, shall fell, or permit to be felled, any trees so that they may fall on to land owned by another, without first obtaining permission from such owner in addition to complying with the terms of this section for the disposal of refuse. All the terms of this section and other forest laws of the state

shall be observed in all clearings of right of way or other land on behalf of the state itself or any county thereof, either directly or by contract; and unless unavoidable emergency prevents, provision shall be made by all officials directing such work for withholding a sufficient portion of the payment therefor, until the piling and burning is completed, to insure the completion of the piling and burning in compliance with the provisions of this section." (L. '17, p. 106, § 3. Cf. L. '11, p. 634, § 16.)

Rem. Rev. Stat. § 5803; RCW 76.04.340:

"Destruction of forests by fire. Any person or persons who shall wilfully and deliberately set fire to any forest within the state, or in any place from which fire may be communicated to any such forest, or who shall accidentally set fire to any such forest, or to any place from which fire may be communicated to any such forest, and shall not extinguish the same or use every effort to that end, or who shall build any fire for lawful purposes or otherwise in or near any such forest, and through carelessness or neglect shall permit said fire to extend to and burn through such forest, shall be deemed guilty of a misdemeanor, and on conviction before a court of competent jurisdiction shall be punishable by fine not exceeding one thousand dollars (\$1000) or imprisonment not exceeding one year, or by both such fine and imprisonment." (L. '23, p. 623, § 9; L. '91, p. 226, § 1; 2 H.P.C., § 84a.)

Rem. Supp. 1941 § 5804; RCW 76.04.350:

"Owners to protect against fires—Exception. Every owner of forest land in the State of Washington shall furnish or provide therefor, during the season of the year when there is danger of forest fires, adequate protection against the spread of fire thereon or therefrom which shall meet with the approval of the State Forest Board: *Provided*, That for the purposes of this

section forest lands, lying in counties east of the summit of the Cascade mountains, shall be deemed to be adequately protected where patrol is furnished by the United States forest service of a standard and efficiency and seasonal duration, deemed by the State Forest Board to be sufficient for the proper protection of the forest land of such counties." (Am. L. '41, ch. 168, §2.)

Rem. Supp. 1945 § 5806; RCW 76.04.380:

"Uncontrolled fire as nuisance—Liability for abatement—Lien for cost of abatement—Logging operation fires. Any fire on any forest land in the State of Washington burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is hereby declared a public nuisance by reason of its menace to life or property. The owner, operator and/or person in possession of land, on which a fire exists, or from which it may have spread, or either or any of them, notwithstanding the origin or subsequent spread thereof on his own or other land, hereby is required to make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the forester, or a warden, or ranger; and if such owner, operator and/or person in possession shall refuse, neglect or fail to do so, the supervisor of forestry or any fire warden or forest ranger acting with his authority shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator and/or person in possession of land and, if the work is performed on the property of the offender, shall also constitute a lien upon said property and/or chattels under his ownership. Such lien may be filed by the Supervisor of Forestry in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of liens for labor and material. It shall be the duty of

the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

“When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies.” (Am. L. '45, ch. 99, § 1, p. 271.)

Rem. Rev. Supp. § 5807; RCW 76.04.370:

“Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington's Revised Statutes; section 2569-1 of Pierce's Code), has been issued.

“If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said

person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): *Provided*, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence." (L. '39, ch. 58, § 1, p. 171.)

Rem. Rev. Stat. § 5808; RCW 76.04.400:

"Co-operative protection by timber owners. When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be

the prosecuting attorney for the county to bring such action for debt, or to foreclose such lien, upon the request of the supervisor of forestry.

“When a fire occurs in a logging operation, such fire shall be fought to the full limit of available employees, as may be necessary, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the state forester, or his authorized deputies, sufficient to bring such fire to a patrol basis, and such fire shall not be left without such fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor of forestry, or his authorized deputies.” (Am. L. '45, ch. 99, § 1, p. 271.)

Rem. Rev. Supp. § 5807; RCW 76.04.370:

“Cut-over lands as public nuisance—Abatement—Cost as lien—Notice before suit—Excepted lands. Any land in the State of Washington covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, and/or right of way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner or owners thereof and the person, firm or corporation responsible for its existence are required to abate such hazard. Nothing in this section shall apply to lands for which a certificate of clearance, under section 2 of chapter 207, Laws of 1929 (section 5792-1 of Remington’s Revised Statutes; section 2569-1 of Pierce’s Code), has been issued.

“If the owner or person, firm or corporation responsible for the existence of any such hazard shall refuse, neglect or fail to abate such hazard, the state supervisor of forestry may summarily cause it to be abated and the cost thereof and of any patrol or fire fighting made necessary by such hazard may be recovered from said

person, firm or corporation responsible therefor or from the owner of the land on which such hazard existed by an action for debt and said costs shall also be a lien upon said land and may be enforced in the same manner, with the same effect and by the same agencies as the lien provided for in section 3 of chapter 105, Laws of 1917 (section 5806 of Remington's Revised Statutes; section 2581 of Pierce's Code): *Provided*, That said summary action hereinbefore referred to may be taken only after twenty (20) days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service on said owner or by registered letter addressed to said owner at his last known place of residence." (L. '39, ch. 58, § 1, p. 171.)

Rem. Rev. Stat. § 5808; RCW 76.04.400:

"Co-operative protection by timber owners. When any responsible protective agency or agencies composed of timber owners other than the state shall agree to undertake systematic forest protection in co-operation therewith and such co-operation shall appear more advantageous to the state than the maintenance of the independent system provided elsewhere by law, the state forester may, with the approval of the state board of forest commissioners, designate suitable areas to be official co-operative districts and substitute thereto whenever necessary, in place of the county wardens elsewhere provided by law, such district wardens, with such district headquarters and duties, as may be agreed upon by him and by the co-operating agencies to render such co-operation most effective. He may also co-operate in the compensation of such wardens, or in the payment of other expenses for the prevention and control of fire in such official fire districts, to such extent as the board of forest commissioners may deem equitable on behalf of the state, and claim for such payments shall be

approved and paid in the manner prescribed for claims outside such co-operative districts." (L. '17, p. 351, § 5.)

Rem. Supp. 1949 § 5817-1; RCW 76.04.410:

"Contracts and undertakings for protection and development of forests authorized. The State Supervisor of Forestry shall, subject to the approval of the Director of the Department of Conservation and Development, have power, subject to the provisions hereof, to enter into contracts and undertakings with private corporations or rural fire protection districts for the protection and development of the forests or any designated forest area within the state." (Am. L. '49, ch. 141, § 1.)

Rem. Rev. Supp. § 5817-2; RCW 76.04.420:

"Contracts by corporations. Any private corporation organized and existing under the laws of this state, or organized under the laws of any other state and legally qualified to transact business in this state, may, where its articles of incorporation or charter so provide, contract with the state supervisor of forestry for the purposes provided for in section 5817-1 hereof." (L. '33, p. 273, § 2.)

Rem. Rev. Supp. § 5817-3; RCW 76.04.430:

"Articles of incorporation — Provisions required. Before any such private corporation shall be qualified to enter into any such contract, there shall be incorporated into the articles of incorporation or charter of such corporation a provision limiting the dividends which are by law payable to the stockholders thereof and such corporation shall, out of its earnings or earned surplus, and in a manner satisfactory to the state supervisor of forestry, provide for the annual setting apart of a fund or funds to discharge any contract entered

into between such corporation and the said state supervisor of forestry relating to said matters." (L. '33, p. 273, § 3.)

Rem. Rev. Supp. § 5817-4; RCW 76.04.440:

"Contracts for protection and development—Requisites. Any undertaking for the protection and development of the forests of the state under this act shall be regulated and controlled by a contract to be entered into between said qualified private corporation and the state supervisor of forestry, such contract to outline the lands involved and the conditions and details of said undertaking, including an exact specification of the amount of funds to be made available by said corporation and the time and manner of the disbursement thereof: *Provided, however,* That before entering into any such contract, the state supervisor of forestry shall be satisfied that said private corporation is financially solvent and will be able to carry out the project outlined in said contract: *And provided further,* That the state supervisor of forestry shall have charge of the project for the protection and development of the forest area described in such contract, and that any expense incurred by said state supervisor of forestry under any such contract shall be payable solely by said corporation from the fund or funds provided by it for said purposes, and that the state of Washington shall not in any event be responsible to any person, firm, company or corporation for any such indebtedness thereby created." (L. '33, p. 274, § 4.)

Rem. Rev. Stat. § 5818; RCW 76.04.450:

"Forest and timber protected. All forests and timber upon all lands in the state of Washington, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard to which they

are or may be exposed by reason of the unusual quantity of fallen timber upon such lands. It shall therefore be unlawful for any person, firm, company or corporation, their officers, agents or employees, to do or commit any act which shall expose any of the forests or timber upon such lands to the hazard of fire." (L. '21, p. 202, § 1.)

No. 14329

United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

Attorneys for Appellant.

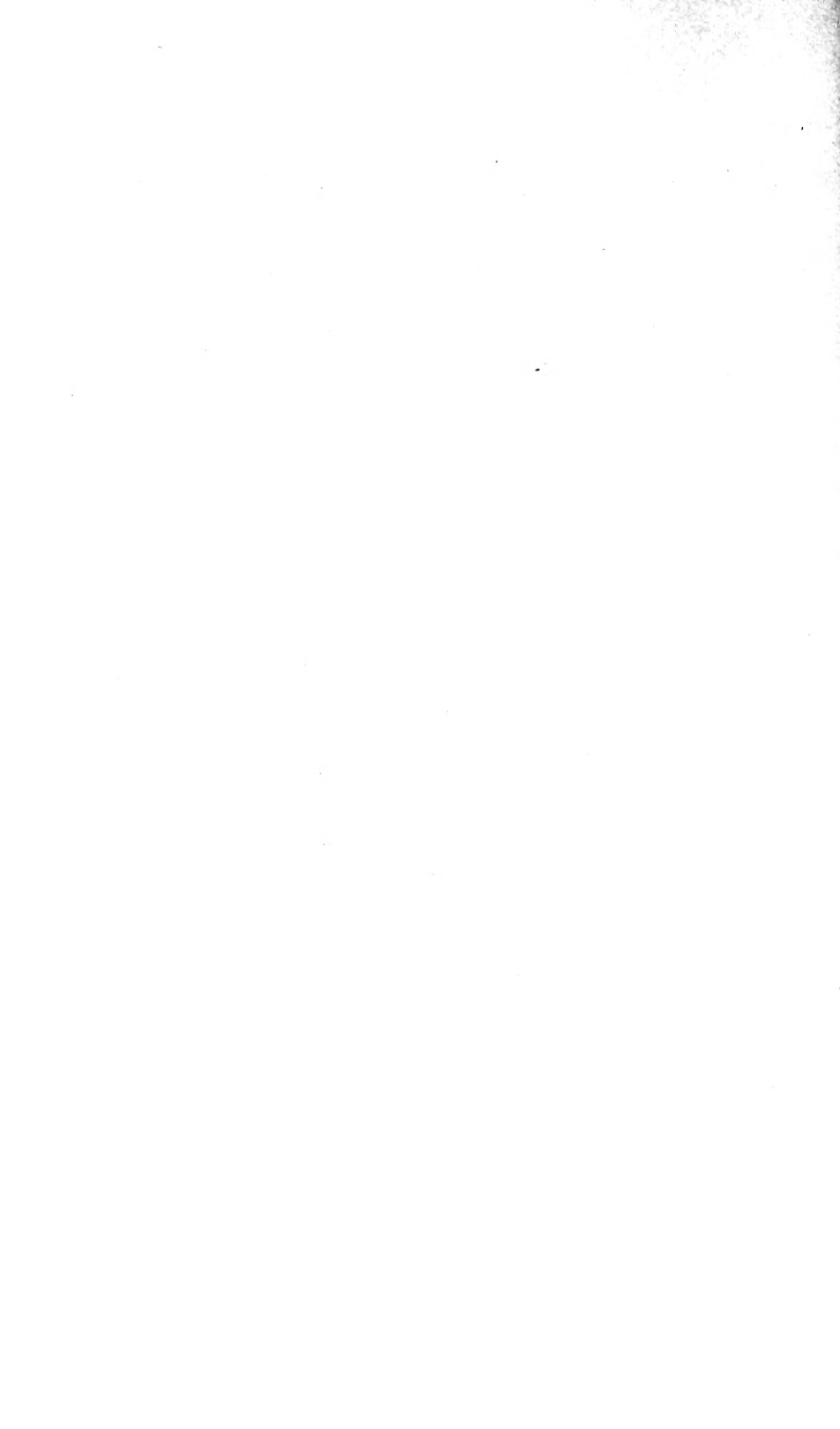
1006 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILED

NOV 1 1954

PAUL P. O'BRIEN,
CLEF



United States Court of Appeals
For the Ninth Circuit

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

INDEX

iii

Foreword	1
Ans. Br.—Part I—Sections A and B (pp. 8-13).....	2
Ans. Br.—Part I—Section C (pp. 13-16).....	5
Ans. Br.—Part II—Section A (pp. 17-22).....	9
Ans. Br.—Part II—Section B (pp. 19-21).....	11
Ans. Br.—Part II—Section C (pp. 21-22).....	12
Ans. Br.—Part III—Sections A and B (pp. 23-38).....	13
Ans. Br.—Part III—Section C (pp. 39-42).....	16
Ans. Br.—Part III—Section D (pp. 42-45).....	18
Conclusion	19
Appendix	21

TABLE OF AUTHORITIES

Cases

<i>Appel v. Muller</i> , 262 N.Y. 278, 186 N.E. 785.....	4
<i>Atlas Assurance Co., Ltd., v. State</i> , 102 Cal.App.2d 789, 229 P.2d 13.....	11
<i>Bloom v. Blanck & Gargaro, Inc.</i> , 62 Ohio App. 451, 24 N.E.2d 615	16
<i>Bowers v. East Tennessee & W. N. C. R. Co.</i> , 144 N.C. 684, 57 S.E. 453.....	11
<i>Brougham v. Seattle</i> , 194 Wash. 1, 76 P.2d 1013.....	17
<i>Brown v. United States</i> , 209 F.2d 463 (2d Cir. 1954).....	20
<i>City of Dalton v. Anderson</i> , 72 Ga.App. 109, 33 S.E.2d 115	4
<i>Collins v. George</i> , 102 Va. 509, 46 S.E. 684.....	8
<i>Conrad v. Cascade Timber Co.</i> , 166 Wash. 369, 7 P.2d 19	7
<i>Cook v. Seidenverg</i> , 36 Wn.2d 256, 217 P.2d 799.....	7
<i>Curoe v. Spokane & I. E. R. Co.</i> , 32 Idaho 643, 186 Pac. 1101, 37 A.L.R. 923 (1920).....	8
<i>Dalehite v. United States</i> , 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).....	9, 10, 13, 20
<i>Discargar v. City of Seattle</i> , 25 Wn.2d 306, 171 P.2d 205..	7
<i>Doherty v. Oakland Beach Volunteer Fire Co.</i> , 70 R.I. 446, 40 Atl.2d 737.....	16
<i>P. Dougherty Co. v. United States</i> , 97 F.Supp. 287.....	17

	<i>Page</i>
Cases	
<i>Eisenkramer v. Eck</i> , 162 Ark. 501, 258 S.W. 368.....	8
<i>Erickson v. Kongsli</i> , 40 Wn.2d 79, 240 P.2d 1209.....	7
<i>Farrell v. L. G. De Felice & Son</i> , 132 Conn. 81, 42 Atl.2d 697	16
<i>Galbraith v. Wheeler-Osgood Co.</i> , 123 Wash. 229, 212 Pac. 174	19
<i>Harris v. United States</i> , 205 F.2d 765, (C.A. 10).....	9, 10
<i>Johnson v. Prange-Guessenhainer Co.</i> , 240 Wis. 363, 2 N.W.2d 723.....	4
<i>Keyser Canning Co. v. Klots Throwing Co.</i> , 94 W.Va. 346, 118 S.E. 521.....	8
<i>Kleinclaus v. Marin Realty Co.</i> , 94 Cal. App.2d 733, 211 P.2d 582	11
<i>Kuehn v. Dix</i> , 42 Wash. 532, 85 Pac. 43.....	7
<i>Leroy Fibre Co. v. Chi., Mil. & St. P. Ry.</i> , 232 U.S. 340....	11
<i>Marzotto v. Gay Garment Co.</i> , 11 N.J. Super. 368, 78 A.2d 394.....	4
<i>Mensik v. Cascade Timber Co.</i> , 144 Wash. 528, 258 Pac. 323	7
<i>H. R. Moch Co. v. Rensselaer Water Co.</i> , 247 N.Y. 160, 159 N.E. 896.....	18
<i>Ottman v. Incorporated Village of Rockville Centre</i> , 275 N.Y. 270, 9 N.E.2d 862.....	16
<i>Paine v. Gamble Stores, Inc.</i> , 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 407.....	4
<i>Prince v. Chehalis Sav. & Loan Assn.</i> , 186 Wash. 372, 58 P.2d 290	8
<i>Riley v. Standard Oil Co. of Indiana</i> , 214 Wis. 15, 252 N.W. 183	8
<i>Spokane International Railway Co. v. United States</i> , 72 F.2d 440 (9th Cir. 1934).....	8
<i>United States v. Griffith, Gornall & Carman, Inc.</i> , 210 F.2d 11 (10th Cir. 1954)	20
<i>United States v. Inmon</i> , 205 F.2d 681 (C.A. 5).....	9, 10
<i>United States v. Praylou</i> , 208 F.2d 291 (4th Cir. 1953)....	20
<i>United States v. Trubow</i> , 214 F.2d 192 (9th Cir. 1954)....	20
<i>United States v. White</i> , 210 F.2d 79 (9th Cir. 1954).....	20
<i>Wood & Iverson, Inc., v. Northwest Lumber Co.</i> , 138 Wash. 203, 244 Pac. 712.....	7, 19

TABLE OF AUTHORITIES

v

Page

Texts

89 A.L.R. 477.....	4
17 Am. Jur. 993.....	2
38 Am. Jur. 827.....	7
28 C.J.S. 750.....	2
65 C.J.S. 413.....	7
Prosser on Torts, p. 264, §39.....	7
2 Restatement of Torts, §§285, 286.....	7

Statutes

Washington Statutes

Rem. Rev. Stat. §2523.....	19
§5818	5, 6, 7, 9
Am. Rem. 1945 Supp. §5806	19
Am. Rem. Supp. §5807	5, 6, 9, 11, 21
RCW §76.04	5
§76.04.220	19
§76.04.380	19
§76.04.370	21

Federal Statutes

28 U.S.C. §2680	1, 19
43 U.S.C. §934	5

Rules

Federal Rules of Civil Procedure, Rule 8(e), (f) and Forms 9, 10	13
---	----

United States Court of Appeals

For the Ninth Circuit

RAYONIER INCORPORATED, a corporation,	} No. 14329
vs.	
UNITED STATES OF AMERICA,	
<i>Appellant,</i>	
<i>Appellee.</i>	

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

REPLY BRIEF

FOREWORD

The organization of this Reply Brief generally conforms to that of the Answering Brief.

The Government's statement of the case is incomplete, and both it and other parts of the Answering Brief contain irrelevant and inaccurate assertions of fact from sources outside the record or which are erroneously claimed by counsel to have been tacitly admitted. Some of those departures are discussed at appropriate places herein. All well-pleaded allegations of the complaint must here be accepted as true, and no deviations therefrom or adverse coloring thereof is permissible upon this challenge to the sufficiency of the complaint (See Op. Br. 13-14). We again urge a full reading of the complaint.

Through their failure to discuss the same, counsel appear to agree that no part of 28 U.S.C. § 2680 is applicable to the case at bar and that no "discretionary function" is involved (Op. Br. 30-35).

ANS. BR.—PART I—SECTIONS A and B (pp. 8-13)

Government counsel assert that the Port Angeles Western Railroad had an easement across government lands, that the Railroad had the responsibility for maintenance of the right of way and that, under the Washington statute, the Railroad had the duty to keep the right of way free of combustible matter. They argue that, by reason of the foregoing, there was no responsibility on the Government to keep the right of way free of combustible matter. Counsel are in error both factually and as to the law.

Paragraph XI of the complaint (R. 11) alleges that “defendant owned,¹ had control of and free and unrestricted access to” the land where the fire started, including the right of way. That allegation must be accepted as true and is highly important.

There was an easement for railroad right of way over government land, but under the allegation it was not of a character that precluded the Government from access and control. The law is well established that the owner of the servient estate has the right to use the land over which an easement is granted to the extent such use does not interfere with the enjoyment of the easement.² Eliminating the combustible material from the right of way would not interfere with the enjoyment of the easement and there was nothing to prevent the Government from conforming to the standard of care which the law and statutes of the State of Washington require of a landowner in a forest area.

Section B of Part I is in error when it says that the holder

¹ The printed record erroneously reads “defendant owner had control * * * .”

² 17 Am. Jur. 993 at 994, 995, Easements § 96; 28 C.J.S. 750, 751, Easements §§ 72 and 73.

of the servient estate owes no obligation to third parties to make repairs. In the first place, the matter of "repairs" is not involved in this lawsuit. It is a matter of cleaning up land which should have been placed in a non-hazardous condition and of tolerance by the Government of fire-hazardous conditions and practices on its lands when it had a right and even a duty to abate the same. Secondly, the cases cited on page 11 of the Answering Brief deal entirely with rights and obligations as between the owners of the dominant and servient estates. They do not deal with the obligations of the owner of the servient estate to third parties. It does not matter here whether the Government could look to the Port Angeles Western Railroad for indemnity against liabilities incurred by the Government. This suit involves the rights of a third party who was damaged by the negligent condition and practices on Government owned and controlled lands.

If we follow counsel's argument correctly, it is their contention that the owner of timberland could log the timber, leave the slash and debris where it falls, and then escape all responsibility for the condition of the land simply by granting an easement across that land. That is patently unsound.

The owner of land cannot escape his obligations and duties to maintain it in a safe condition unless he parts with all right of control or access to the land. Generally, by conveying fee title a man no longer has right of access to or control of the land and therefore is not liable for anything which happens after title passes from him. To some degree the same principle applies where property is leased to another. However, even under landlord-tenant rules, if the landlord retains the right of access to the leased premises, he then remains liable for damages to third persons resulting from a dangerous condition of the premises.

Appel v. Muller, 262 N.Y. 278, 186 N.E. 785;

Paine v. Gamble Stores, Inc., 202 Minn. 462, 279 N.W. 257, 116 A.L.R. 407;

Johnson v. Prange-Guessenhainer Co., 240 Wis. 363 2 N.W.2d 723;

City of Dalton v. Anderson, 72 Ga. App. 109, 33 S.E.2d 115;

Marzotto v. Gay Garment Co., 11 N.J. Super. 368 78 A.2d 394;

See also the annotation in 89 A.L.R. 477.

Since the owner of land over which an easement is granted has access thereto and can do anything on the right of way which does not interfere or conflict with the use of the easement, it follows, with even greater force than in the landlord-tenant situation, that such landowner is liable for damage resulting from an unlawful and hazardous condition of the land. It does not matter whether the land was in that condition when the Government acquired title thereto nor whether the condition was created by the holder of the easement. The Government, as owner, accepted responsibility for the condition of the land when it accepted title thereto; and regardless of its rights against the Railroad, the Government, as owner of the fee, is still responsible for the results of its condition.

The foregoing principles of law are not the only basis on which we have alleged that the Government had control of and access to the right of way and adjoining lands. There are further facts which, under the allegations of the complaint, we can and would be entitled to establish. But regardless of the additional facts, it is clear, as a matter of law, that the existence of an easement over the Government lands does not relieve the Government of its obligations as a landowner.

(If it makes any difference in this case counsel erroneously state that the easement was granted by the United States pursuant to the Right of Way Act, March 3, 1875, 18 Stat. 482, 43 U.S.C. 934. That statement is outside the record, is erroneous in fact and is contrary to the allegations of the complaint. We are prepared to prove that such right of way as existed was granted years ago by a private party, the then owner of the right of way area and adjoining lands, to another private party, that the United States thereafter acquired the servient estate and adjoining lands in an exchange transaction with the private owner, and that still other agreements and relationships between the Government and the Railroad gave the Government access and control.)

ANS. BR.—PART I—SECTION C (pp. 13-16)

Government counsel challenge the applicability of Rem. Rev. Stat. §§ 5818 and 5807, brushing off § 5818 with the passing comment that that statute requires an act and since there was no act involved in the existence of the fire-hazardous conditions the statute is inapplicable. They say that § 5807 drastically changes the common law, that it is a criminal statute and therefore can have no bearing on this case.

To recognize properly the status of these two statutes one must take into account the importance of the timber industry in the State of Washington and the public policy in this state as declared by the legislature in the numerous statutes designed to protect its timber resources. A reading of RCW, Chapter 76.04, many of the sections of which are set forth in Appendix B of our Opening Brief, and of the cases cited in our Opening Brief and in this brief relating to forest fires, will make clear the concern which both the legislature and the courts of this state have for the safety of Washington's

greatest natural resource. Private parties and both the state and federal government own extensive timber. Some areas are even more vulnerable to fire than others due to topography, weather conditions and the hazardous situations which can be created by improper clearing and logging operations and forestry practices. When weighed in the light of those considerations and having in mind that private, state and federal timber are intermingled, it is clear that the statutes in question are designed to establish a standard of conduct and to protect the interests of all timber owners.

When § 5818 says "It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire," the phrase "do any act" is plainly synonymous with the phrase "to be guilty of any conduct" and must also include omissions. To adopt counsel's argument would mean that it is no crime to build a bonfire but the offense occurs only when the torch is set to it. In the case at bar, the bonfire was all stacked and ready to go on the government-owned right of way and adjoining lands. It was permitted to remain there in the face of long-continued operation of defective railroad equipment known to be capable of starting a fire at any time in dry weather.

Section 5807 and its predecessors have been on the statute books since 1917. While amended several times, this statute has continuously stated that land covered in whole or in part by inflammable debris likely to further the spread of fire is a fire hazard. Whether that is a criminal statute or not, it nevertheless establishes a standard of care, failure to conform to which is negligence.

It is well established that conduct which violates such a statute may be negligent conduct in itself if: (a) the plaintiff

is one of a class of persons whom the statute was intended to protect; and (b) the harm which has occurred is of the type which the statute was intended to prevent and (c) if all of the other elements of tort are present. See Prosser on Torts, § 39, p. 264; 2 Restatement of Torts, §§ 285 and 286; 38 Am. Jur. 827; 65 C.J.S. 413, *et seq.*; *Discargar v. City of Seattle*, 25 Wn.2d 306, 171 P.2d 205; *Erickson v. Kongsli*, 40 Wn.2d 79, 240 P.2d 1209; *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799. Violations of forestry statutes of this state have repeatedly been held proper grounds for civil relief. See *Kuehn v. Dix*, 42 Wash. 532, 85 Pac. 43; *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712; *Mensik v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323; *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P.2d 19.

It is also significant that in its earlier versions § 5807 required that the fire hazard be abated by the owner *or* person responsible for the existence of the hazard, but that in 1929 and subsequent versions the statute was amended to require that both the owner *and* the person responsible for the existence of the hazard be required to abate the same. Legislative intent to make the owner of the servient estate responsible could not be more clearly stated.

It is clear that §§ 5818 and 5807 are applicable because appellant, as owner of timber which was jeopardized by the fire hazard, is one of a class of persons whom the statute was intended to protect; because the statute was designed to prevent fires and the spread thereof; and because all of the other elements of a tort are present.

This Court has recognized that violation of a statute may be the basis for civil liability even though criminal penalties

attach to the violation. In *Spokane International Railway Co. v. United States*, 72 F.2d 440 (9th Cir. 1934), the defendant railroad was held liable for damages resulting from fire caused by its passing train. The court said at p. 442:

“(4-6) We come then to the effect of the Idaho statute which required defendant to keep its right of way ‘clear and free from all combustible and inflammable material, matter or substances,’ during the closed season from June 1st to September 1st. This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another. If the fire originated on defendant’s right of way in inflammable material, which in violation of the statute had been allowed to accumulate there, it would be immaterial whether a spark from defendant’s engine or the act of a third person from without defendant’s right of way had caused the fire. *Curoe v. Spokane & I.E.R. Co.*, 32 Idaho, 643, 186 P. 1101, 37 A.L.R. 923 (1920). On the other hand, even though the fire was set by a spark from defendant’s engine, if it ignited material lying outside of the right of way, negligence in failing to maintain the right of way in accordance with the statute would be immaterial unless such failure contributed to the spread of the fire.”

Apart from the statute cited, property owners have been held liable for accumulations of combustibles of various types on their premises under common law. *Prince v. Chehalis Sav. & Loan Assn.*, 186 Wash. 372, 58 P.2d 290; *Collins v. George*, 102 Va. 509, 46 S.E. 684; *Riley v. Standard Oil Co. of Indiana*, 214 Wis. 15, 252 N.W. 183; *Eisenkramer v. Eck*, 162 Ark. 501, 258 S.W. 368; *Keyser Canning Co. v. Klots Throwing Co.*, 94 W. Va. 346, 118 S.E. 521.

Counsel say it would be unreasonable to impose responsi-

bility for the condition of the land in perpetuity. The answer to that is twofold. First, the timber which the statute is designed to protect is a resource which the legislature wishes to maintain and protect in perpetuity. Second, there are statutory procedures by which a property owner can dispose of the fire hazard and obtain clearance, thus relieving himself of the responsibility.

ANS. BR.—PART II—SECTION A (pp. 17-22)

Counsel attempt to characterize appellant's case as one based upon the theory of absolute liability without fault, and then cite the case of *Dalehite v. United States*³ and subse-
 → Act does not subject the Government to liability without fault. Again, counsel are in error.

The *Dalehite case* and the Court of Appeals cases⁴ cited on page 19 of the Answering Brief involved damages which were caused by inherently dangerous articles. In each of those cases the court found that there was no negligence on the part of government employees. We do not contend that the combustible matter on the government lands was an inherently dangerous commodity or that the Government is liable without fault. Our case is one of claimed liability *with* fault, based upon negligence.

Sections 5807 and 5818 establish standards of care for landowners practically identical to the standards of care required by common law.⁵ Failure to conform to those standards constitutes negligence.

³ 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956 (1953).

quent cases, in which the court has ruled that the Tort Claims

⁴ *United States v. Inmon*, 205 F.2d 681, 684 (C.A. 5);
Harris v. United States, 205 F.2d 765, 767 (C.A. 10).

⁵ See cases cited on p. 8, *supra*.

Government counsel confuse "negligence per se" with "absolute liability without fault." There is a vital difference and the Court should not fail to differentiate the two theories. In the three cases cited by counsel, if negligence had been present in the handling of the inherently dangerous articles then the Government would have been liable. In the *Dalehite* case, if the explosive fertilizer had been negligently exposed to flame and an explosion followed, the Government would have been liable. In the *Inmon* case, if the Government had failed to make an effort to clean up the old firing range and dispose of dud shells, or had failed to fence and post signs around the area, thus being negligent, the Government would have been liable. In the *Harris* case, if the government employees had negligently flown over the adjacent farmlands and sprayed the herbicide directly on those crops, the Government would have been liable. However, in each of those cases, the court expressly found no negligence existed.

In the case at bar, the slash and debris on the government property was not in itself inherently dangerous. It took something more to make that debris spring into flame and cause the damage complained of. The inflammable material both on the right of way and on the adjoining lands could have been disposed of by the Forest Service employees under conditions which would have prevented any possibility of it causing damage. The Forest Service employees knew that the inflammable material would burst into flame if sparks were introduced into it; knew that the Railroad equipment was defective and was being operated in a negligent manner apt to throw sparks into the debris; knew that fire on those lands would imperil and might spread to the forests in the vicinity; and had the power to prevent both the fire-hazardous con-

dition and the fire-hazardous practices. Yet they failed to do so. That was negligence. The common law, as well as the public policy of the State of Washington, as expressed by the legislature in §§5807 and 5818, are to the effect that in forested areas where fire can do extensive damage it is negligence to permit the accumulation of inflammable material. Failure to abate that condition and to prevent the hazardous practices was negligent omission.

If the classic mail-truck driver knowingly drove a mail truck with defective brakes in heavy traffic and, being unable to stop, damaged someone, certainly the Government would be liable. Such action would be contrary to a criminal statute which established a standard of care, and would involve an article not inherently dangerous but which is negligently exposed to a situation which could cause damage. The same principles apply to the case at bar.

ANS. BR.—PART II—SECTION B (pp. 19-21)

Government counsel cite four cases⁶ to the effect that the owner of land adjoining a railroad right of way need not conform the use of his land to guard against the negligence of the railroad. Those cases are inapplicable to the case at bar.

The *Bowers* case affirmed a non-suit and assumed, without deciding, that the defendant had been negligent, but determined that proximate cause had not been established.

⁶ *Bowers v. East Tennessee & W.N.C.R. Co.*, 144 N.C. 684, 57 S.E. 453;

Leroy Fibre Co. v. Chi., Mil., & St. P. Ry., 232 U.S. 340;
Atlas Assurance Co. Ltd. v. State, 102 Cal. App.2d 789, 229 P.2d 13, 17, 19;

Kleinclauss v. Marin Realty Co., 94 Cal. App.2d 733, 211 P.2d 582, 583-584.

The other three cases hold the defendant railroads liable for damages suffered by the adjacent landowners from fires originating on the railroad right of way. Each case holds that the plaintiff was not guilty of contributory negligence and found that the plaintiff in each case was using his land adjacent to the railroad in a proper and lawful manner.

In the case at bar the Government's land adjacent to the railroad was maintained in an improper, sub-standard and fire-hazardous condition, contrary to the law of the state. Furthermore, the Government owned, had control of and access to the railroad right of way upon which similar improper conditions existed. Also, the Government had the right and power to abate the fire-hazardous conditions and practices on the right of way, a circumstance which was not present in the four cases cited. In the cases cited the negligent acts of the railroads were isolated and non-recurring acts which the adjoining landowners were not required to anticipate. In the case at bar there was a long-standing fire-hazardous condition on the right of way and on the Government's adjacent land, and the negligent practices of the railroad had continued for a long time prior to the fire, all of which facts were known to the Forest Service employees.

ANS.BR.—PART II—SECTION C (pp. 21-22)

Government counsel suggest that there is no causal connection between the negligence complained of and the damage sustained. This we are unable to follow. See the complaint and particularly paragraph XI (R. 11-12) and paragraphs XXXV, XXXVI and XXXVIII (R. 26-29). The complaint alleges a continuous related chain of circumstances and events for which the Government is accountable commencing

long prior to the fire on August 6th and continuing until the breakaway of the big fire on September 20th.

Proximate cause is sufficiently alleged under Federal Rules of Civil Procedure, Rules 8(e) and 8(f) and Forms 9 and 10.

ANS. BR.—PART III—SECTIONS A and B (pp. 23-38)

The Government characterizes all of the acts and omissions that occurred on or after August 6, 1951, as fire fighting activities done in the performance of a public function which is clothed with sovereign immunity under the Federal Tort Claims Act as interpreted by the *Dalehite* case.

Pages 23 to 29 of appellee's brief are devoted to a rather fuzzy theory that appellee's lands and employees were dedicated to public benefit and service and for that reason, alone, the Government should not be liable. Throughout the brief the reader is conditioned by repeated use of the word "public," e.g., "public function," "public activities," "public responsibilities," "public character," "public officers," "public firemen," "public domain," "public duty," "public bodies," "public forests," "public at large," "public land" and "public nature of fire fighting endeavors."

The Court should not be misled by any such conditioning process from the real inquiry as to whether the negligence alleged falls within any exception to the statutory waiver of sovereign immunity and whether a private individual under like circumstances would be liable.

In an effort to create an immunized status for the National Forests and the Forest Service, appellee recounts their establishment and development. What it says there could also be said of Rayonier and of many other companies in the timber industry. Rayonier, too, has established forests, is interested

and active in conservation, timber management, continuous supplies of timber, protection against destruction by fire and depredation upon its forests, etc., etc. Rayonier has its own Forest Service, which also has a record of growth and re-organization and which has been headed by men interested in conservation. Rayonier call its Forest Service its "Timber Division." Its functions are the same as those of the United States Forest Service. It protects against fire, but like the Forest Service it does not maintain a fire department. Some of Rayonier's foresters and engineers are also State Fire Wardens, which is useful because that status gives them *authority* to prevent improper practices and meet emergencies on Rayonier's lands. And, like the Forest Service Rangers, Rayonier's Timber Division employees handle acquisitions and sales, road construction, logging, supervision of hunters, fishermen and recreationists, and carrying out of conservation, harvesting and reforestation of timberlands. The complaint alleges these facts in substance.

The point of all this is that the United States owns and administers property for the same purposes and in the same fashion as Rayonier and other private industries and its Forest Service employees have the same jobs and duties as employees of Rayonier and other private timber operators. That the public, i.e., the citizens of the United States, benefit therefrom or enjoy the fruits of this activity is immaterial. The Government, engaging in this activity, is liable for the negligence of its employees, just as are private parties, who could be and sometimes are performing the identical acts.

Counsel's argument ignores: (a) the duty of the Government as a landowner; (b) the fact that the Forest Service's purpose is to administer *Government* lands and to protect

those lands—not the lands of other people—from fire and depredation, and (c) the duty of the Forest Service to co-operate with other timber owners in order to conserve *Government* property which can best be accomplished by reciprocal aid and by action for mutual and common benefit.

Government counsel concede liability if a Government vehicle is negligently driven, even if engaged in fire fighting.⁷

Apparently counsel believe that the public function so traditionally exempt ceases at the squirting of water on the blaze. If some part of active participation in fire fighting activities can give rise to liability, why cannot negligent non-activity also be a basis for claim? Is it a public function to permit fire-hazardous conditions and practices on Government lands or to assume supervision of fire fighting and then sit idly by for forty days and let a smoldering fire jeopardize millions of dollars worth of Government and private timber?

Forest Service employees were hired to look after the property of their employer. They were not hired for the benefit of the "public at large," as that expression is used with reference to a municipal fire department. Their functions and duties revolve entirely around the protection and administration of Government owned lands and timber, just as private employees protect and administer private property. Again, as pointed out (Op. Br. 58-59), if it had not been the Forest Service which committed itself to take charge in case of fire it could have been Rayonier or some other company or association of private timber owners which undertook that responsibility.

⁷ See Ans. Br. p. 38, footnote 29.

ANS.BR.—PART III—SECTION C (pp. 39-42)

Government counsel urge that the Forest Service employees were, in effect, acting as agents of the State in fighting the fire, that as such agents they were performing a public function and that they are therefore entitled to the benefits of the sovereign immunity of the State. This argument is unsound for several reasons.

The State has not waived its sovereign immunity, whereas the Federal Government has. The Federal Government cannot vicariously clothe itself with the immunity of the State. The F.T.C.A. says the Government shall be liable in the same manner as a private individual (not in the same manner as a state or other sovereign), under like circumstances. A private individual could have been party to a contract with the State similar to that made by the Forest Service.

A private party performing fire fighting services for the public at large, either independently or under contract with the municipality in which it operates, is liable for its negligence while engaged in fire fighting activities. *Farrell v. L. G. De Felice & Son*, 132 Conn. 81, 42 Atl.2d 697; *Doherty v. Oakland Beach Volunteer Fire Co.*, 70 R.I. 446, 40 Atl.2d 737; *Ottman v. Incorporated Village of Rockville Centre*, 275 N.Y. 270, 9 N.E.2d 862. See also *Bloom v. Blanck & Gargaro, Inc.*, 62 Ohio App. 451, 24 N.E.2d 615, wherein the city's independent contractor performing sewer construction work, a governmental function, was held liable for its negligence while at the same time the city was held immune from liability. The court said that the immunity of the city does not extend to the contractor. Similarly, the Washington Supreme Court has held a municipal corporation of this state immune from liability for negligent acts of its

officials performing a governmental function, but held the officials personally liable for their negligent conduct in office. *Brougham v. Seattle*, 194 Wash. 1, 76 P.2d 1013.

The Forest Service employees were not agents of the State. They were acting as Forest Service employees for the protection and administration of Forest Service timber. Deputization of some Forest Service employees as state forest wardens was a matter of convenience to give them additional authority by which to perform their duties to their employer. In this respect they were no different than many employees of private timber owners.

Counsel fail to refer to paragraph 9 of the Cooperative Agreement (R. 7) which expressly preserves to private persons their rights to recover damages on account of fires resulting from any negligent act of a forest landowner or a timber operator within the Protective Area and any other rights of similar nature under Washington, federal or general law (Op. Br. pp. 23-25).

While disclaiming any intent to extend the principles of municipal immunity to the Federal Tort Claims Act, counsel cite four cases on page 40 of their brief, based wholly upon municipal immunity from negligence of municipally employed firemen. They are obviously inapplicable.

In footnote 31 on page 42 of the Answering Brief, counsel note our failure to call to the attention of the court reversal of the District Court decision in *P. Dougherty Co. v. United States*, 97 F.Supp. 287, which we cited on page 20 of our Opening Brief. We regret the oversight, but the principle announced in the District Court opinion and the quotation therefrom which appears in our brief is still good law. The *Dougherty* case was reversed by the Court of Appeals but on

other grounds. The majority opinion does not disavow the principle that the Government may be liable as a volunteer. The two judges who did comment on liability of a volunteer as being pertinent to the decision vigorously and emphatically approved the principle stated by the District Judge.

Counsel make much of the case of *H. R. Moch Co. v. Rensselaer Water Co.*, 247 N.Y.160, 159 N.E. 896. Counsel seem to miss the point made by us (Op. Br. pp. 23-25). We do not sue on the Cooperative Agreement. Rather we point to that contract as establishing a duty on the Forest Service, breach of which was negligence.

The *Moch* case expressly by-passed a very important question present in the case at bar. The court said, page 899:

“We put aside also the problem that would arise if there had been reckless and wanton indifference to consequences measured and foreseen.”

By failing to use sufficient available men and equipment and by doing practically nothing for forty days while the smoldering area continued to imperil nearby timber, the Forest Service employees manifested reckless and wanton indifference to consequences measured and foreseen.

ANS. BR.—PART III—SECTION D (pp. 42-45)

Counsel seek to divorce the Government from its identity as owner of land upon which fire originated and from which the fire spread, and from its identity as an actor supervising fire fighting. They also characterize the Forest Service employees as the equivalent of a municipal fire department established for the sole purpose of fighting fires for the benefit of the public at large. Since counsel's argument is premised upon assumptions contrary to the facts in the case at bar, it is pointless.

The true question is whether a private individual standing in the place of the Government under all of the facts and circumstances of this case, would be liable. The answer is yes, as we have demonstrated.

It is pertinent that the Washington Supreme Court has held the owner of land on which fire occurs is liable for improper fire fighting, even though it is done on his behalf by state fire wardens. *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174; *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712. The landowner must guard and extinguish the fire, and he is not relieved of his responsibility just because he employs a state fire warden to do the work.

Also pertinent are two other state statutes, Rem. Rev. Stat. §2523, RCW 76.04.220, which imposes the duty upon every person carefully to guard or to extinguish any fire, whether on his own land or on the land of another; and Am. Rem. Supp. 1945 §5806, RCW 76.04.380, which provides that the owner, operator or person in possession of land on which a fire exists or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other land, is duty bound to make every reasonable effort to control and to extinguish such fire immediately after receiving notice to do so. Here the Forest Service had immediate personal notice.

CONCLUSION

The Tort Claims Act does not retain immunity from liability for negligence in the performance of a "public function" as such. 28 U.S.C. §2680 specifically describes several functions which are public or governmental where immunity is

expressly retained. It follows by necessary implication that immunity is waived as to all other functions which might be characterized as public or governmental. This construction of the Act has repeatedly been recognized by the courts holding the Government liable for torts committed in the exercise of "public functions" (See Op. Br. pp. 39-40). Recent post-*Dalehite* decisions have held the Government liable for negligence related to public functions: *United States v. Praylou*, 208 F.2d 291 (4th Cir. 1953), involved a crash of a government plane operated by government employees on government business; *Brown v. United States*, 209 F.2d 463 (2d Cir. 1954), veterans' hospital case involving malpractice; *United States v. Griffith, Gornall & Carman, Inc.*, 210 F.2d 11 (10th Cir. 1954), military airfield negligently drained caused damage to nearby landowner; *United States v. White*, 210 F.2d 79 (9th Cir. 1954), negligence toward business invitee on deactivated firing range; *United States v. Trubow*, 214 F.2d 192 (9th Cir. 1954), defective condition of elevator door in Marine Hospital in San Francisco.

The order appealed from should be reversed.

Respectfully submitted,

HOLMAN, MICKELWAIT, MARION.
BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

APPENDIX

We have noted an error in the reproduction of Rem. Rev. Stat. §5807; R.C.W. 76.04.370 on pages 22 and 72 of our Opening Brief. The present form of this statute is set forth below and appears also on page 48 of the Government's answering brief. We regret the error. It occurred as the result of confusion in copying due to the several amendments and due to the interchange as between Remington's Revised Statutes and the Revised Code of Washington. The legislative history of §5807 is as follows:

Laws of 1917, Section 4 of chap. 105, p. 349 at 351;
Laws of 1921, Section 2 of chap. 64, p. 196 at 198;
Laws of 1929, Section 1 of chap. 134, pp. 351 and 352;
Laws of 1939, Section 1 of chap. 58, pp. 171 and 172; and
Laws of 1951, Section 1 of chap. 235, pp. 742 and 743.

Those parts of the Statute which are important to the case at bar have remained substantially in the same form since 1917 in all of its amended versions.

Am. Rev. Supp §5807; R.C.W. 76.04.370.

"Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien.

Nothing in this section shall apply to land for which a certificate of clearance has been issued.

“If the owner or person responsible for such hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic’s lien. The summary action may be taken only after twenty days’ notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence.”
Laws of 1951, Section 1 of chap. 235, pp. 742 and 743.

No. 14329

**United States Court of Appeals
For the Ninth Circuit**

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING *EN BANC*

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

FILE

SEP 30 1955

PAUL P. O'BRIEN, CLERK

No. 14329

**United States Court of Appeals
For the Ninth Circuit**

RAYONIER INCORPORATED, a corporation, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING *EN BANC*

HOLMAN, MICKELWAIT, MARION, BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,

Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.



INDEX

	<i>Page</i>
Grounds	1
Proximate Cause	3
The Dalehite Case.....	7
Pre-August 11th Negligence.....	11
Conclusion	17
Certificate of Counsel.....	18
Appendix — Am. Rem. Supp. 1945 §5806; R.C.W. §76.04.380	19

TABLE OF AUTHORITIES

Cases

<i>Dalehite v. United States</i> (1953) 346 U.S. 15, 97 L.Ed. 1427, 73 S.Ct. 956.....	2, 7, 8, 9, 10
<i>Fleming v. Seattle</i> (1945) 45 Wn.2d 477, 275 P.2d 904	4
<i>Leroy Fibre Co. v. Chicago M. & St. P. R. Co.</i> (1914) 232 U.S. 340.....	12, 13
<i>McInnis v. Squires</i> (1925) 136 Wash. 10, 238 Pac. 925	4
<i>McLeod v. Grant County School District</i> (1953) 42 Wn.2d 316, 255 P.2d 360.....	4
<i>Palin v. General Construction Co.</i> (1955) 147 Wash. Dec. 223, 287 P.2d.....	4
<i>Pig'n Whistle Corporation v. Scenic Photo Pub. Co.</i> , 57 F.2d 854 (9th Cir. 1932).....	14
<i>Riley v. Standard Oil Co. of Indiana</i> (1934) 214 Wis. 15, 252 N.W. 183.....	14
<i>Squires v. McLaughlin</i> (1953) 44 Wn.2d 43, 265 P.2d 265	4
<i>State of Washington v. Canyon Lumber Corpora- tion</i> (1955) 146 Wash. Dec. 648, 284 P.2d 316.....	14
<i>Stephens v. Mutual Lumber Co.</i> (1918) 103 Wash. 1, 173 Pac. 1031.....	13

Statutes	<i>Page</i>
Washington Statutes	
Am. Rem. Supp. 1945 §5806.....	15, 16, 19
Am. Rem. Supp. §5807.....	14
Rem. Rev. Stat. §2523.....	16, 17
Rem. Rev. Stat. §5818.....	14
R.C.W. §76.04.220	16
R.C.W. §76.04.370	14
R.C.W. §76.04.380	15, 16, 19
R.C.W. §76.04.450	14
Federal Statutes	
28 U.S.C. §1346(b)	2, 13
28 U.S.C. §2674	2, 13
Federal Rules of Civil Procedure	
Rule No. 8(e)	4
Rule No. 8(f)	4
Rule No. 84.....	4
Appendix of Forms, Federal Rules of Civil Procedure	
Form No. 9.....	4
Form No. 10.....	4

United States Court of Appeals For the Ninth Circuit

RAYONIER INCORPORATED, a corporation,
vs.
UNITED STATES OF AMERICA,

Appellant,

Appellee.

No. 14329

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

PETITION FOR REHEARING *EN BANC*

To: The Honorable Homer T. Bone, Circuit Judge,
The Honorable William E. Orr, Circuit Judge,
The Honorable William T. Hastie, Circuit Judge.

Appellant, Rayonier Incorporated, aggrieved by this Court's September 1, 1955, decision affirming summary dismissal of appellant's complaint, respectfully petitions hereby for an *en banc* rehearing of this appeal.

GROUND

Summarized, appellant's grounds for a rehearing *en banc* are:

(1) The Opinion decides important questions of Washington law in a way in conflict with applicable Washington law:

(a) As respects proximate cause; termination of risk; and duties of landowner to fight fire on his land and to pursue and extinguish same.

(b) By citing a Washington Supreme Court decision but holding contrary to it.

(c) Because it is premised, in part, upon an erroneous understanding of fact with respect to the title and control of the land upon which the fire started. As a result, inapplicable authorities are cited in the opinion; erroneous statements are made as to the relationships and duties of the Government and of the railroad to appellant; and the *Dalehite* case (if that case is applicable at all) is extended to immunize the Government from liability for fires tortiously caused by Government employees on the Government's own land.

(2) The Opinion decides a federal question in a way in conflict with applicable decisions of the United States Supreme Court as respects:

(a) Rules governing the construction of a complaint subject to a motion to dismiss;

(b) Federal Tort Claims Act requirements that the law of the State shall determine the Government's liability.

(3) The Opinion decides important questions of federal law, heretofore unsettled by any court, as respects the application of the principles of municipal corporation law to actions against the Government under the Federal Tort Claims Act. The unsettled questions are:

(a) Is the "public fireman" pronouncement of the *Dalehite* case a controlling principle of law or was it expressed as *obiter dictum*?

(b) How can the "public fireman" immunity become a settled, controlling principle of law in Federal Tort Claims Act cases without legislative changes.

(c) If the "public fireman" immunity of mu-

municipal law is to be a controlling principle of Federal Tort Claims Act law, should not the equally "doctrinally sanctified" exceptions to that immunity also be carried over and applied to Federal Tort Claims law and the Government be liable in the same exceptional circumstances in which cities are liable for the negligence of their public firemen? Should such "public fireman" immunity apply only to federal fire departments analogous to municipal fire departments or should it apply also to the Forest Service; and should it apply so as to immunize the Government from Forest Service negligence and non-fire-fighting activities and duties? Should distinction be made between "proprietary" and "governmental" functions as in municipal law?

(4) The Opinion discusses questions not put in issue by Government counsel nor raised by the Court during oral argument. Appellant should have opportunity to be heard on those questions.

PROXIMATE CAUSE

The fire which started on Government owned and controlled land on August 6 burned continuously thereafter and did the damage complained of. Fire burned in a natural and continuous sequence, unbroken by any new independent cause, and produced the damage to Rayonier's property, and without that fire which started August 6 the damage to Rayonier's property would not have occurred. Fire-hazardous conditions and practices on Government owned and controlled property negligently permitted by the Government effectively contributed to and made possible the fire which started August 6. Under Washington law those conditions and

practices and the fire which started August 6 were the proximate cause of the damage.

Squires v. McLaughlin (1953) 44 Wn.2d 43, 265 P.2d 265.

Proximate cause is a question of fact, not a question of law, except in rare circumstances, and should be determined by the trier of the facts.

McInnis v. Squires (1925) 136 Wash. 10, 238 Pac. 925;

McLeod v. Grant County School District (1953) 42 Wn.2d 316, 255 P.2d 360;

Fleming v. Seattle (1945) 45 Wn.2d 477, 483, 275 P.2d 904;

Palin v. General Construction Co. (1955) 147 Wash. Dec. 223, 287 P.2d

Paragraph XXXVI of the Complaint (R. 29) alleges that each of the acts of negligence described in the Complaint was a direct and proximate cause of the damage. Rules of Civil Procedure, Rules 8(e) and (f) provide that pleadings shall be simple, concise and direct, that no technical forms are required and that all pleadings shall be so construed as to do substantial justice. Forms 9 and 10, approved by Rule 84, indicate that in pleading proximate cause it is necessary only to state the facts and then say: "As a result, plaintiff [was injured, etc.]." The Opinion does not suggest any lack of adequacy in the allegation of paragraph XXXVI of the Complaint in stating that the damage was the result of the acts described.

The Complaint must be construed in a light most

favorable to the plaintiff, with all doubts resolved in plaintiff's favor and all allegations accepted as true.¹ We submit the Opinion has not done this. Appellant is entitled to have the question of proximate cause determined in the trial of the case. If, as the Opinion implies, there are questions of unforeseeable intervening force, superseding cause or termination of risk, those likewise are matters of defense and questions of fact on which we are entitled to be heard. There is nothing in the record justifying those questions at this time nor justifying a dismissal on those grounds.

The Opinion is obscure and confusing on the question of proximate cause, intervening force and termination of risk. It says, page 3:

“* * * In our opinion it was this *recurrence* of fire on the 1600-acre tract which was the sole proximate cause of the injury to appellant's property and that risks, if any, created by the acts or omissions of agencies of the Government prior to the containment of the fire in the 1600-acre area had terminated. * * *” (Emphasis added)

Why was such “recurrence” of fire the sole proximate cause? The Opinion does not explain. The fire did not recur. It was the same fire that started August 6 still burning, the same men still acting, the same timber which was in jeopardy, and the same dry weather conditions. The fire did not start in the 1600-acre tract. It would not have reached the 1600-acre tract or ever started were it not for the conditions and events which occurred before it reached that tract.

When did the risks, created prior to the containment

¹See authorities cited, Op. Br., p. 13.

of the fire, terminate and what caused them to terminate? The Opinion does not explain. Does the Court intend to imply that when one responsible for the start of a fire has it contained and under control his duty has ended or that the risk of fire has thereby terminated? If so, that is contrary to Washington law.

The Washington statutes² establish that the risk from fire does not terminate until the fire is extinguished. They require, in so many words, that the landowner *and* the party responsible for the fire and the fire-hazardous conditions both control *and* extinguish the fire. A doctor's obligation does not end when he stops the flow of blood; he must disinfect the wound and sew it up. Half-way measures are no more tolerated by Washington forestry laws.

Does the above quote from the Opinion imply that there was an intervening force or superseding cause which ended the force of the original cause? The Opinion does not explain, although the authorities cited in Opinion footnote 1 in support of the quote suggest that the Court might have in mind some intervening force or superseding cause. Those authorities deal with unforeseeable intervening forces and superseding cause. They are not applicable to the facts in the case at bar because the Complaint here specifically alleges that everything contributing to the September 20 breakaway fire was foreseeable and could have been guarded against and avoided by prudent conduct. This includes the pre-August 11th condition of and practices on the Government owned and controlled right of way and

²See Op. Br., pp. 21-23, 65, 70, 71.

adjoining lands (R. 11-13) and the wind and weather (R. 10, 15, 23, 24, 27).

The only intervening force apparent to us is the Forest Service employees' negligence in doing nothing. The Opinion quotes paragraph XXXII of the Complaint, which describes the Forest Service doing nothing, and then simply says:

“On these facts, liability may not be predicated on conduct occurring before the spread of the fire to the 1600-acre tract.”

The Opinion says that at this point the Forest Service employees became public firemen. It implies that if the Government is negligent only once in its capacity as landowner it will be held accountable, but if it is negligent twice, once as a landowner and later as a public fireman, it will not be liable at all.

We are unable to learn from the opinion why the Court has ruled as it has with respect to proximate cause and related matters. The problem, as treated by the Opinion, was not raised by Government counsel nor by the Court during oral argument. We have never been notified that anyone thought such problem exists, nor have we ever been heard on the subject or had opportunity to present our views. This situation, by itself, justifies a rehearing in this case.

THE DALEHITE CASE

The Opinion first divorces plaintiff's damage from events occurring prior to August 11 by stating that risks, if any, created by acts or omissions of the Government prior to the containment of the fire in the 1600-acre tract (which occurred on August 11) had ter-

minated, and that it was the “recurrence of fire on the 1600-acre tract which was the sole proximate cause of the injury”. This holding of the Opinion is, in our judgment, clearly erroneous, as above noted. Acts and omissions prior to that date, as well as conduct subsequent to that date, all proximately caused the injury and the complaint should properly be so construed. If we are correct in this, then we have the question whether the pre-August 11th occurrences constituted negligence on the part of the Government. That subject is discussed later. Assuming for the moment that such negligence existed prior to August 11, can the Government then claim that the “public fireman” immunity principle suggested by the *Dalehite* case intervenes and precludes recovery for pre-August 11th negligence which proximately caused the injury, regardless of whether there was or was not negligence after August 11? In other words, can the Government escape liability for its negligent acts simply by putting on a fireman’s hat after its negligence has occurred and thereafter participating in the events which lead to the damage?

If this Court feels that the “public fireman” immunity of municipal corporation law is applicable under the Federal Tort Claims Act to the case at bar, should not the exceptions to such immunity, which make municipalities liable for acts of their public firemen under certain circumstances, also be applied in construing the Federal Tort Claims Act?

Since “public fireman” immunity is the child of municipal corporation law, should not such law’s distinction between “governmental” and “proprietary” func-

tions also be projected into Federal Tort Claims Act law?

We can add little to the discussion of these questions in Opening Brief, pages 36 through 57, and Reply Brief, pages 13 to 17. We make only the following additional observation on the Opinion's treatment of the *Dalehite* case.

In an effort to bring this case within the "public fireman" immunity principle referred to in the *Dalehite* decision, the Opinion erroneously characterizes the activities of the Forest Service. It says, page 5:

"* * * The [forest] service has entered into several agreements similar to the one alleged to be in force here *whereby it assumes the state function of suppressing fires* on all lands within a particular area, whether publicly or privately owned. * * *" (Emphasis added)

We submit that fighting and suppressing forest fires is not a "state function," *per se*, at least in the State of Washington. It is true that some state officers are authorized or required to fight forest fires; but the forestry statutes, both of the State of Washington and of the United States, approach the fire control problem as one common to private individuals, the State and the United States as timber owners, and authorize agreements whereby either the private timber owner, the State timber owner or the Federal timber owner may be the one who assumes responsibility for taking the initiative in preventing and fighting fires (See Op. Br., pp. 25, 58, 59). The statutes, therefore, do not regard this as a state or governmental function.

Since the Opinion is silent as to the Court's judgment

as to whether the post-August 11th occurrences and conditions constituted negligence, we must assume that the Court agrees that the Government was guilty of negligence after August 11 and that such negligence was a proximate cause of plaintiff's damage. The Opinion disposes of this facet of the case by holding that it is controlled by the *Dalehite* decision and that the Government is immune because from August 11 on the Forest Service employees were public firemen.

We earnestly repeat our belief that the "public fireman" immunity language of the *Dalehite* decision is *obiter dictum*; that the facts in the *Dalehite* case were not comparable to those in the case at bar,³ principally because in *Dalehite* the Coast Guard had no duty to fight the fire and hence there was no breach of duty upon which negligence must be based, whereas in this case there was a clear duty on the Government, which was breached.⁴

The questions posed above and in our Briefs, the implications arising and the perplexity and confusion which would be created through extension of municipal corporation law to the application of the Federal Tort Claims Act are apparent from these questions. They are matters of grave and far-reaching importance which justify and, to our minds, compel a rehearing *en banc* in this case in order that the whole Court may have opportunity to consider the problem and establish a guide which will serve as sound precedent for other cases which will inevitably follow.

³ For full discussion, see Op. Br., pp. 36-57, and Reply Br., pp. 13-15.

⁴ See Op. Br., pp. 15-26.

PRE-AUGUST 11th NEGLIGENCE

After having concluded that the sole proximate cause of plaintiff's damage was the spread of the fire from the 1600-acre tract and that the negligence of the Forest Service employees from that time on was not actionable because of the "public fireman" immunity, the Opinion discusses some but not all of the other points made by appellant. We feel that the Opinion's conclusions on other points discussed by it are in error and that such error stems in several material respects from a misunderstanding of the facts.

It is patent from the Opinion's language on page 6 that the Court misunderstands the facts concerning title to and control of the railroad right of way and the influence of those facts on this case. The Complaint (R. 11) states that the Government "owned, had control of and free and unrestricted access" both to the railroad right of way and the adjoining lands. We submit that the Opinion disregards that allegation and unjustifiably assumes the facts to be different than as alleged. The Opinion (pp. 6 and 7) implies that the Government had only "a right to enter and inspect the right of way" and that such was the limit of its rights and title. That is contrary to the Complaint. From the cases cited on page 6 both in the text and in the footnote, the Opinion apparently adopts the erroneous supposition of the Government's Brief. We direct attention to the parenthetical statement in our Reply Brief, page 5.

From such erroneous treatment of the facts, the Opinion then discusses, and cites authorities applicable only to the rights and duties of the owners of dominant

and servient estates as between themselves. That is not pertinent to the case at bar. Regardless of the rights and duties of the Government and the Railroad Company, *inter sese*, Rayonier, as a third party, has been damaged, and under the facts pleaded it has a right, if it so chooses, to hold either or both of the dominant and servient owners accountable.

Based upon such incorrect treatment of the facts, the Opinion erroneously nullifies the Government's liability and responsibility as one owning and having control of the right of way.

It thus treats the Government as "an adjoining landowner to whose property fire, ignited on the property of a third party, has spread." (p. 7). Such is not the fact. The fire was ignited on the Government's property, spread to additional Government property and then pursued its course which ultimately reached Rayonier's timber. Furthermore, the Opinion erroneously implies that the land adjacent to the right of way is of a character similar to that involved in cases such as *Leroy Fibre Co. v. Chicago M. & St. P. R. Co.* (1914) 232 U.S. 340, and those cited in Opinion footnote 4. Those cases hold there is no contributory negligence by the plaintiff who has failed to conform use of his land to the use of adjoining land and has suffered damage as a consequence. Typically, they are urban, industrial situations where a plaintiff builds a warehouse adjacent to defendant's theretofore established railroad or chemical plant which is a known fire hazard. Granting that in some such cases a landowner is not required to conform the use of his land to that of the adjoining land, the

principle invoked in those cases is not applicable to the case at bar. The lands here involved are forest lands, useful for no other purpose. The railroad right of way runs through forest lands. The Washington forestry statutes require that all such lands, including railroad right of way and adjoining lands, be cleared of debris because of the fire hazard. The Washington law requires that all such lands conform to standards which will minimize or eliminate fire risk, regardless of the use to which the same may be put. It is to that extent and to that extent only that we insist the Government lands adjoining the right of way must conform. Failure to conform to the standard thus established is negligence.

In discussing the cases on this subject the Opinion (p. 7) acknowledges "There is a division of authority on the question of whether failure to maintain safe conditions on adjoining land may constitute contributory negligence in a suit by such landowner to recover against the party responsible for the fire. * * *" The Opinion then cites the Washington case of *Stephens v. Mutual Lumber Co.* (1918) 103 Wash. 1, 173 Pac. 1031, as one of the authorities holding that failing to conform the use of one's land to that of the adjoining land is negligence, but then adopts the opposing line of cases as this Court's ruling, in direct conflict with the applicable Washington case. If there is a division of authority, the case at bar should be controlled by the Washington decisions and not by *Leroy Fibre Co.*, a case with a Minnesota background.

In discussing this same question, the Opinion declines to follow the only case cited to the Court which is direct-

ly in point⁵ because it is an "extreme" one. Washington law is extreme in the standards required to protect against forest fire hazards, and those standards are comparable to the standards sustained in the *Riley* case.

The Opinion states that Rem. Rev. Stat. §§5807 and 5818 impose liability without fault (p. 9). We believe that statement is contrary to Washington law. *State of Washington v. Canyon Lumber Corp.* (1955) 146 Wash. Dec. 648, 284 P.2d 316.

The Opinion seems to miss the point made by us and the primary purpose for which the several statutes were cited in our briefs. We do not assert liability of the Government without fault because of violation of the statutes. We cited those statutes for the purpose of showing the high standard of conduct and degree of care set by the Washington Legislature to be met by all who own or are in possession of forest land in the state. Statutes, even criminal statutes, are properly used to determine the standard of care, failure to conform to which may be the basis for civil liability for negligence. See Opening Brief, pp. 21-23, Reply Brief, pp. 5-9 and cases therein cited. See also *Pig'n Whistle Corporation v. Scenic Photo Pub. Co.*, 57 F.2d 854 (9th Cir. 1932).

The Opinion filed September 1 makes no reference to this well established principle. It is clear under the allegations of the Complaint that the Government did not maintain either its lands on the right-of-way or on its lands adjoining the right-of-way to the minimum standards set by Washington statutes. It has not been sug-

⁵ *Riley v. Standard Oil Co. of Indiana* (1934) 214 Wis. 15, 252 N.W. 183.

gested by any one that the Government, as owner of lands in forest areas, should not be required to conform to those standards. This principle is basic and goes directly to the question of whether the Government was or was not guilty of negligence which contributed to and was a proximate cause of the fire. The Opinion's treatment of the question is in conflict with the public policy established by Washington statutes and court decisions, and is in conflict with prior decisions of this Court and others which hold that even criminal statutes may determine the standard of care in negligence cases.

On page 9 of the Opinion the Court observes:

“* * * To hold an intermediate landowner liable for damage to property caused by fire passing over his land, to all parties subsequently damaged notwithstanding the efforts of public firemen to extinguish the fire, would be to impose a harsh rule.”

This comment is made with respect to a fire which starts on the land of a third party.

We submit that the Court's observations here are erroneous for two reasons. In the first place, the fire started on land which “defendant owned, had control of and free and unrestricted access to” (R. 11). It did not start on land of another and then spread across the Government's land. Secondly, the statute, Am. Rem. Supp. 1945 §5806, R.C.W. §76.04.380, prescribes a standard of care for “the owner, operator or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands.” We do not know whether the Opinion was written with the above quoted section of the statute in mind because the

quotation of §5806 in footnote 8 of the Opinion is the form in which that section appeared in the 1917 laws but in which the quoted language does not appear. For the convenience of the Court we have included in the Appendix to this Petition a copy of the statute, Am. Rem. Supp. 1945 §5806, R.C.W. §76.04.380, which was in effect in 1951 and which contains the language above quoted.⁶ The Opinion comments that the landowner's duty does not become operative until receipt by him of written demand from a state official. For the purposes here cited, that part of the statute is obviously immaterial because the Forest Service had immediate actual notice of the fire from its inception and actively participated in fighting it at all times thereafter. The important thing is that the statute imposes a standard of conduct failure to conform to which is negligence.

We think it material also that the Opinion does not comment on Rem. Rev. Stat. §2523, R.C.W. §76.04.220, which, while a criminal statute, establishes a standard of conduct. That statute reads as follows:

“76.04.220. *Negligent fires—Penalty.* Every person who wilfully or negligently sets, or fails to carefully guard, or extinguish any fire, whether on his own land or the land of another, whereby the tim-

⁶ It is with compassion that we direct this inadvertence to the Court's attention. In checking this matter, we find that in the Appendix to our Opening Brief we quoted §5806 in its form immediately prior to the 1951 amendment. However, the critical portion of the statute was substantially the same in both the 1951 law and that in effect immediately prior thereto. Also, Opinion footnote 6 quotes the 1917 form of §5807 (See p. 14, *supra*). The 1951 form of this statute appears in Reply Brief Appendix for the Court's convenience.

ber or property of another is endangered, or who fails to respond to any lawful summons to aid in guarding or extinguishing any fire, shall be guilty of a misdemeanor. (1909 c. 249, §271; R.R.S. §2523) ”

We again ask the question put by our Opening Brief (p. 43) which has been ignored and unanswered by Government counsel, which is not referred to in the Opinion and which, if answered, we believe will give the correct result in the case at bar.

“Let us assume that the positions of the parties to this lawsuit were exactly transposed, that is, that the United States was the plaintiff and Rayonier the defendant, and that the conditions, acts and omissions described in the Complaint were those created, tolerated or committed by Rayonier and its employees. Is there any reason in fact or in law why the positions of the parties could not be transposed in all material respects and, in such example, would Rayonier be liable to the United States?”

CONCLUSION

In our judgment, the issues involved in this case are of major importance and deserving of careful consideration by the full Court. We believe that the Opinion contains unfortunate expressions in conflict with Washington law which, by terms of the Federal Tort Claims Act, should control; and which are in conflict or irreconcilable with principles of law previously subscribed to by this Court and the United States Supreme Court. As noted above, the Opinion has developed theories not urged by Government counsel nor suggested by the Court at the time of oral argument, presumably because

they were not judged to be properly involved in the case. For that reason, we feel we have not had our full day in court. In the interests of fairness and substantial justice, as well as for important policy reasons, we petition for a rehearing by the Court of Appeals sitting *en banc*.

Respectfully submitted,

HOLMAN, MICKELWAIT, MARION,
BLACK & PERKINS,
LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

1006 Hoge Building,
Seattle 4, Washington.

CERTIFICATE OF COUNSEL

Lucien F. Marion and Burroughs B. Anderson certify hereby that they are counsel for appellant herein; that appellant makes the foregoing Petition for Rehearing *En Banc* in good faith and that, in their judgment and in the judgment of each of them, the said petition is well founded and is not interposed for delay.

LUCIEN F. MARION,
BURROUGHS B. ANDERSON,
Attorneys for Appellant.

APPENDIX

Am. Rem. Supp. 1945 §5806; R.C.W. §76.04.380:

“Uncontrolled fire a public nuisance—Abatement—Costs. Any fire on any forest land burning uncontrolled and without proper action being taken to prevent its spread, notwithstanding the origin of such fire, is a public nuisance by reason of its menace to life and property. The owner, operator, or person in possession of land, on which a fire exists, or from which it may have spread, notwithstanding the origin or subsequent spread thereof on his own or other lands, shall make every reasonable effort to control and extinguish such fire immediately after receiving written notice to do so from the supervisor, or a warden or ranger; and if such owner, operator, or person in possession refuses, neglects, or fails to do so, the supervisor or any fire warden or forest ranger shall summarily abate the nuisance thus constituted by controlling or extinguishing the fire and the cost thereof may be recovered from such owner, operator, or person in possession and if the work is performed on the property of the offender, shall also constitute a lien upon the property or chattels under his ownership. Such lien may be filed by the supervisor in the office of the county auditor and foreclosed in the manner provided by law for the foreclosure of mechanics’ liens. The prosecuting attorney shall bring the action to recover the cost or foreclose the lien, upon the request of the supervisor.

“The payment of forest patrol assessment on the land shall be interpreted as a reasonable effort in suppressing and extinguishing any fire on the land except when the fire started on that land as a result of owner/operator negligence and except when extra debris is present as described under laws pertaining to slash responsibility.

“When a fire occurs in a logging operation it shall be fought to the full limit of available employees, and such fire fighting shall be continued with the necessary crews in such numbers as are, in the opinion of the supervisor or his authorized deputies, sufficient to bring the fire to a patrol basis, and the fire shall not be left without a fire fighting crew or fire patrol until authority so to do has been granted in writing by the supervisor, or his authorized deputies. (1951 c. 58 §9, last am'ds 1917 c. 105 §3; formerly Rem. Supp. 1945 §5806.)”

No. 14331 ✓

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

To: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM E. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

FERGUSON & BURDELL

W. H. FERGUSON

W. WESSELHOEFT

DONALD MCL. DAVIDSON

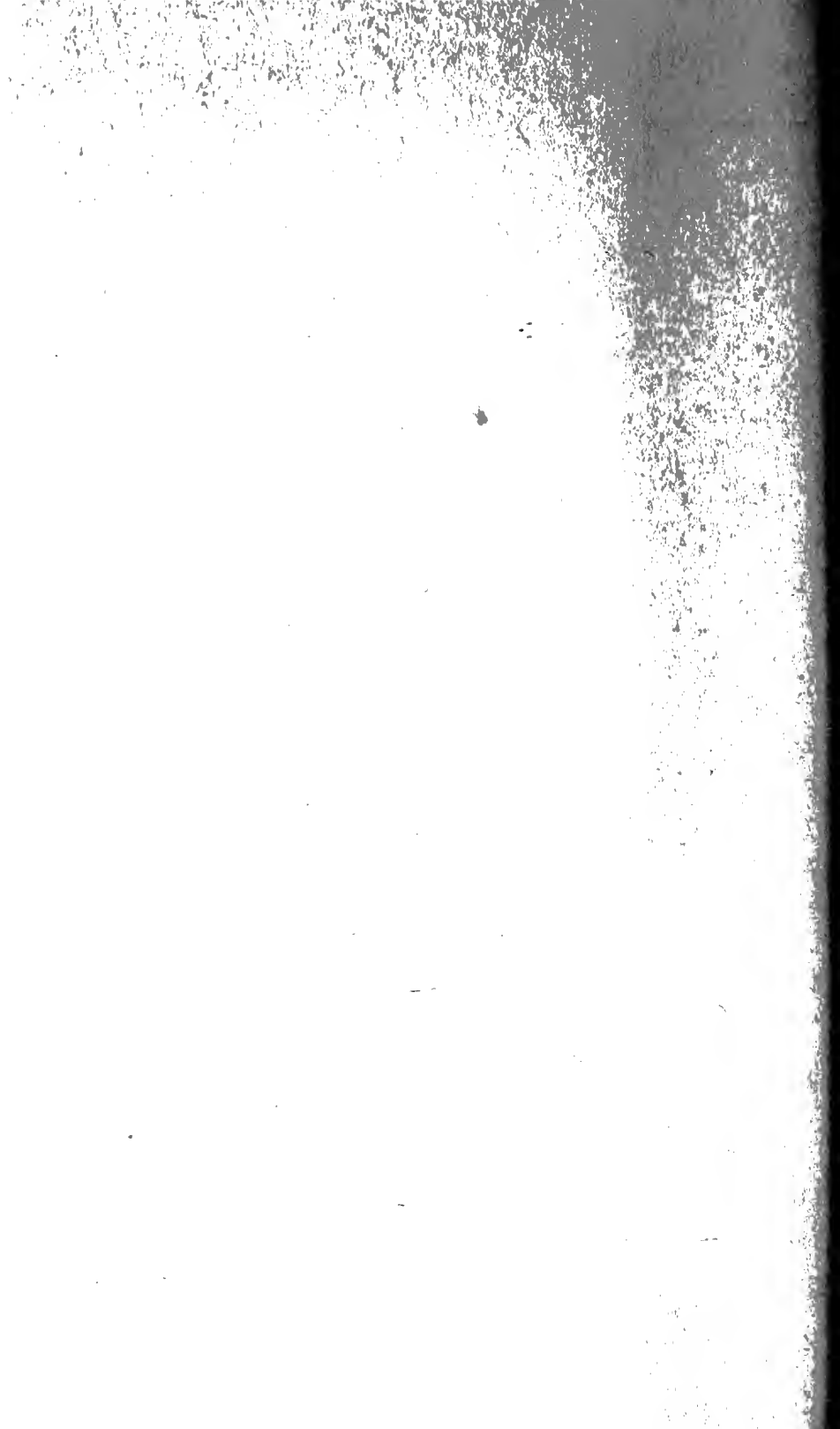
Attorneys for Appellants

1012 Northern Life Tower,
Seattle 1, Washington

FRAYN  LETTERPRESS

FILED
OCT - 1 1955

PAUL E. O'BRIEN, CLERK



No. 14331

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

To: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM E. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

FERGUSON & BURDELL

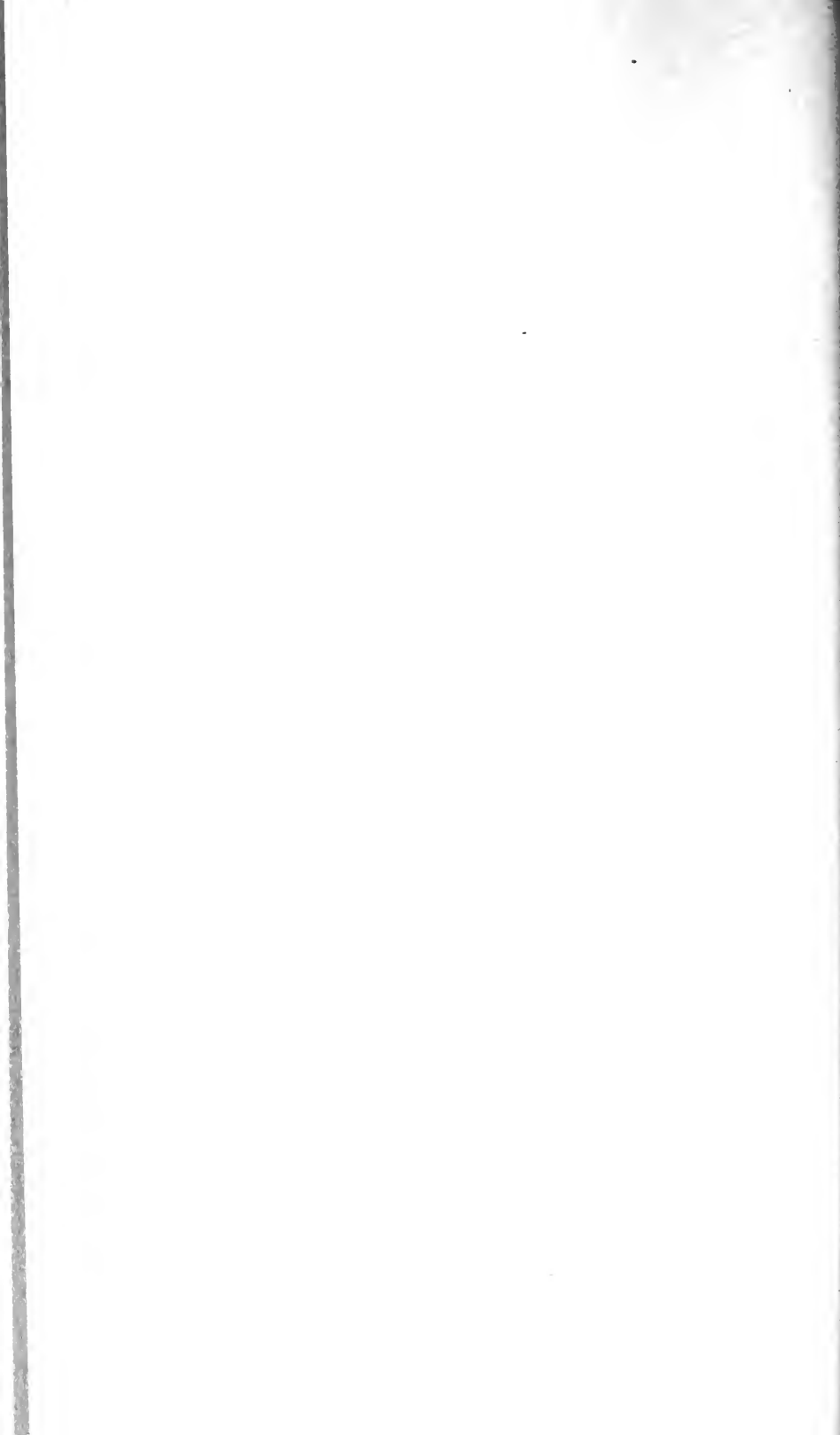
W. H. FERGUSON

W. WESSELHOEFT

DONALD McL. DAVIDSON

Attorneys for Appellants

1012 Northern Life Tower,
Seattle 1, Washington



INDEX

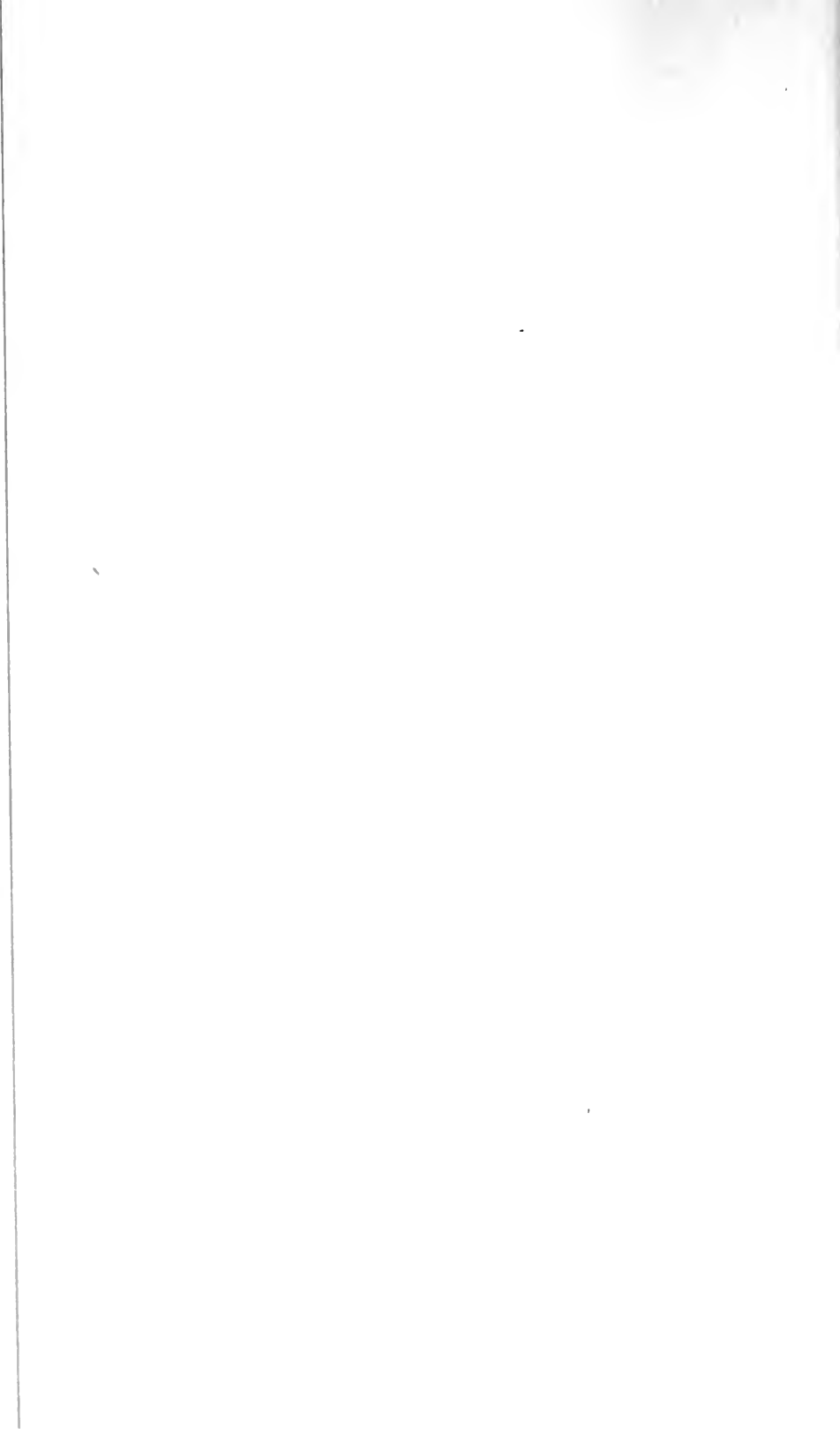
I	Proximate Cause	2
	(a) Washington Law on intervening cause.....	3
	(b) Intervening Cause by the Same Wrongdoer.....	4
	(c) Wind as Intervening Cause.....	5
	(d) Effect of Court's Holding on Subsequent Trial....	6
II	Liability of Servient Owner.....	7
III	Liability Imposed by State Statutes.....	8
IV	Mis-Interpretation of the Dalehite Case.....	10
	Conclusion	11
	Certificate of Counsel.....	12

TABLE OF CASES

<i>Conrad v. Cascade Timber Co.</i> , 166 Wash. 369, 7 P. (2d) 19	9
<i>Conry v. B. & O. Railroad Company</i> , 209 F. (2d) 423, (CCA 3d 1953)	8
<i>Dalehite v. United States</i> , 346 U. S. 15, 97 L Ed. 1427, 73 S. Ct. 956 (1953)	4
<i>Danielson v. Pac. Tel & Tel. Co.</i> , 41 Wn. (2d) 268, 248 P. (2d) 568 (1952)	3
<i>Fleming v. Seattle</i> , 45 Wn. (2d) 477, 275 P. (2d) 904 (1954)	3
<i>McLeod v. Grant County School District</i> , 42 Wn. (2d) 316, 255 P. (2d) 360 (1953)	3
<i>Mensick v. Cascade Timber Co.</i> , 144 Wash, 528, 258 Pac. 323	6
<i>Palin v. General Construction Company</i> , 147 WD 233, P. (2d)	4
<i>Reed v. Allegheny Co.</i> (1938), 330 Penn. 300, 189 Atl. 187..	7
<i>Spokane International Railway Company v. United States</i> , 72 F. (2d) 440, (CCA 9th 1934)	9
<i>State v. Canyon Lumber Corp.</i> , 146 WD 648,..... P. (2d) (Sup. Ct. Wash. En Banc, 1955)	9

TABLE OF STATUTES

RCW 76.04.370 (Rem. Rev. Stat. 5807)	8
RCW 76.04.450 (Rem. Rev. Stat. 5818)	8



UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

PETITION FOR REHEARING

TO: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM E. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

COME NOW ARTHUR ARNOLD et al, appellants herein and, aggrieved by this court's decision filed September 1, 1955, affirming the trial court in the granting of Appellee's motion for judgment on the pleadings, respectfully petition the above entitled department for a rehearing *en banc* under Rule 23 of the Rules of the 9th Circuit Court of Appeals.

The grounds on which this petition is based are as follows:

I.

Proximate Cause

The complaint alleges three phases of government negligence. The opinion disposes of the first two phases by reaching a conclusion on the pleadings with respect to proximate cause. Page 3 of the Opinion says:

“In our opinion it was this recurrence of fire on the 1600 acre tract which was the sole proximate cause of the injury to appellants’ property and that the risks, if any, created by the acts or omissions of the government prior to the containment of the fire in the 1600 acre area had terminated.”

A footnote on that page then proceeds to recite case authorities on the subject of intervening cause. The court then holds as a matter of law on the pleadings that the acts and omissions discussed in parts 3 and 4 of appellants’ Opening Brief¹ did not proximately cause the damage. It thus appears that the holding is grounded on the doctrine of intervening cause.

This holding is a surprise to all parties concerned in this action. The subject was not argued in any

-
- ¹(a) Failing to remove or eliminate combustibles on the right-of-way when it had reserved the right to do so; (R8)
(b) Failing to compel the railroad to take proper safety precautions when it had reserved the right to do so; (R8)
(c) Causing slash to accumulate on a portion of government property near the railroad right-of-way; (R8)
(d) On first receiving a report of fire, Floe sent insufficient men to control it; (R11)
(e) The men so sent took insufficient equipment with them (R11)
(f) When he received word from these men that the fire was out of control, Floe did not send sufficient additional men; (R11)
(g) Floe failed to follow the Fire Suppression Plan in combatting the blaze on the morning of August 7th. (R12)

brief. The decision is not in accord with Washington law which could have been brought to the court's attention, had this matter been raised in appellee's brief. Nor is there any case authority relieving the United States, negligent in a proprietary capacity, from liability arising therefrom, on the ground of an intervening cause, to-wit: the United States negligent in a governmental capacity. Finally, this holding could have an effect on the trial court which will be deciding the same issue in the trial between plaintiff-appellants and the defendant Port Angeles Western Railroad, which trial is being held in abeyance pending this appeal.

(a) *Washington Law on intervening cause*

The Washington Supreme Court has become increasingly vehement in refusing to find as a matter of law that liability for certain acts and omissions has been negated by an intervening act or omission. The rule as expressed in *McLeod v. Grant County School District*, 42 Wn. (2d) 316, 255 P. (2d) 360 (1953), is that in deciding on intervening negligence as a matter of law, the court must consider "whether such occurrences are so highly extraordinary or improbable as to be wholly beyond the range of expectability." See also *Danielson v. Pac. Tel. & Tel. Co.*, 41 Wn. (2d) 268, 248 P. (2d) 568 (1952).

In *Fleming v. Seattle*, 45 Wn. (2d) 477, 275 P. (2d) 904 (1954), the court in dealing with this question of foreseeability, sets the following rule:

"Whether foreseeability is being considered from the standpoint of negligence or proximate cause, the pertinent inquiry is not whether the actual harm was of a particular kind which was

expectable. Instead, the question is whether the actual harm fell within a general field of danger which should have been anticipated."

In the case of *Palin v. General Construction Company*, 147 WD 223, P. (2d), the opinion of which was filed on the same day as the opinion in this case, the Washington State Supreme Court used identical language in refusing to hold as a matter of law that an intervening criminal act was the proximate cause of a loss, saying at page 226:

"We are satisfied that what happened here was in no way so extraordinary or improbable as to be outside the ambit of the reasonably foreseeable."

The court's opinion does not regard as extraordinary or improbable the neglect of the Forest Service men to use reasonable methods to control the fire within the 1600 acre tract. The opinion is, therefore, not supported by the Washington cases.

(b) *Intervening Cause by the Same Wrongdoer*

The court holds that under the authority of the *Dalehite* case², the United States is not liable for the negligence of its servants acting in the capacity of public firemen. Then it applies the doctrine of intervening cause to cut off liability of the United States for negligent acts of its servants before they became public firemen. Thus, the United States, negligent in a governmental capacity, is regarded as an intervening cause avoiding liability of the United States for its servants acting in a proprietary capacity. An exhaustive search of the text authorities on municipal corporations and negligence

² *Dalehite v. United States*, 346 U. S. 15, 97 L. Ed. 1427, 73 S. Ct. 956 (1953).

has revealed to appellants no authority for such a holding. Its rationale is contrary to public policy. Every time a United States servant commits an act which is actionable under the Tort Claims Act, the United States will be on the outlook for an intervening cause. Unconscionable government employees will furtively but deliberately create such intervening causes.

The foregoing paragraph concedes, *arguendo*, that the Forest Service men in fighting the fire after the breakaway were acting in a governmental capacity. However, appellants strongly urge that in fact the Forest Service employees were at all times acting in a proprietary capacity. This argument is spelled out at length in both appellants' opening and reply briefs.

On the other hand, if the court adheres to the opinion that the Forest Service employees acted in a governmental capacity in fighting the fire in its later stages, it runs head-on into the following general rule:

"The act of a third person will not amount to an intervening efficient cause when such person is merely performing a duty necessitated by, or resting on, the original wrongdoer." 65 C.J.S., p. 676.

(c) *Wind as Intervening Cause*

It is possible that the court intended to hold that the intervening proximate cause of the damage to appellants' property was not the government's negligent refusal to employ available resources to extinguish the fire but was the fact of the wind which fanned the flames at the time of the breakaway.

If this was the court's position, we submit that it is erroneous.

In *Mensick v. Cascade Timber Co.*, 144 Wash. 528, 258 Pac. 323, the court considered assertions by the appellant-defendant to the effect that the damage was due "solely to the intervening of unusual, abnormal, unanticipated and unprecedented combinations of natural causes. . . ." In response thereto, the opinion said at page 538:

"The above assertions are controverted by the facts that appellant had not cut the snags in the area to be burned and had not constructed a fire trail between the slashings on its land and respondent's property so as to reasonably protect it. Nor was there any gale which suddenly sprang up, such as was the case in the *Stephens* case, *supra*, largely relied upon by appellant, where the wind changed and blew from an exactly opposite direction very suddenly, and blew very violently. The same was true in the *Lehman* case, *supra*."

The opinion of this court did not advert to that Washington case or any other Washington cases on this subject of intervening cause. The complaint alleges specifically that the wind causing the flare up was "of not unusual force in said area" (R. 15).

(d) Effect of Court's Holding on Subsequent Trial

The appellants brought their action against the United States, the Port Angeles Western Railroad and Fibreboard Products, Inc. The case against defendants Railroad and Fibreboard is at issue and is being held in abeyance pending the outcome of this appeal. One of the issues at the trial between appellants and the defendant Port Angeles Western Railroad is the issue of intervening cause. On this

appeal, the issue was not raised in the briefs. The court raised it on its own accord. This holding, although not *ipso facto* binding on the trial court in an action between appellants and the other two defendants, will, nevertheless, affect the trial court's thinking on the issue.

Appellants do not contend either that this court should not raise issues on its own motion or that it should not make holdings which will affect the thinking of the trial court on subsequent actions involving one of the parties. Appellants do strenuously urge, however, that this court, having taken both steps at the same time, should grant to appellants a rehearing *en banc* in order that they may present their arguments on this major issue.

II.

Liability of Servient Owner

Because the opinion rested its decision primarily on the doctrine of intervening cause in conjunction with a holding that the Forest Service men in the latter stages of the conflagration were acting in a governmental capacity, it devoted little space to the allegations of earlier acts and omissions by the Forest Service employees.

Of paramount importance was the issue regarding the duty of a servient estate under facts as alleged in the amended complaint. The court disposes of this issue in one paragraph of the Rayonier opinion, quoting *Reed v. Allegheny Co.* (1938), 330 Penn. 300, 189 Atl. 187, and in one paragraph in the Arnold opinion. The fact is that the *Reed* case holds that both dominant and servient owners are liable to a third party for damage occasioned by improper

maintenance of the easement. The language relied upon by the court is directed at the liability of the dominant owner to the servient owner, as a careful reading will disclose. That issue is not here involved. The *Reed* case is authority that both may be liable to a third party—the issue before the court in this case. The opinion does not refer to the subsequent decision cited in Appellee's Reply Brief³ wherein the 5th Circuit held that an actual inspection and repair of a highway and railway intersection by a railway imposed liability upon it under Pennsylvania law, even though the right of way was actually owned by a separate but controlled operation—a clear holding that liability to third parties cannot be defeated by a mechanistic application of dominant-servient, landlord-tenant or licensee-licensor labels. As to third parties, the liability is the same, however different the rights of parties between themselves may be.

III.

Liability Imposed by State Statutes

In Appellant's Brief the statutes RCW 76.04.370 (Rem. Rev. Stat. 5807) and RCW 76.04.450 (Rem. Rev. Stat. 5818) are discussed together. In the latter statute entitled "Olympic Peninsula Area Protection" the court defines what shall constitute that area and then goes on to provide that "it shall be unlawful for any person to do any act which shall expose any of the forest or timber upon such land to the *hazard of fire*" (emphasis supplied). The former statute provides that "any land . . . covered

³ *Conry v. B. & O. Railroad Company*, 209 F. (2d) 423, (CCA 3d 1953).

wholly or in part by inflammable debris . . . shall constitute a *fire hazard*" (emphasis supplied).

These statutes were not set out in the complaint or in Appellants' Opening Brief in an attempt to impose liability without fault, although the opinion appears to regard them as such an attempt. Quite to the contrary, they are quoted to impose civil liability for negligence. The recent case of *State v. Canyon Lumber Corp*, 146 WD 648, P. (2d) (Sup. Ct. Wash. *En Banc*, 1955) holds RCW 76.04.370 to be constitutional and not a statute imposing liability without fault.

The proposition is glaringly simple:

1. Leaving slash on the ground is defined by the State Legislature as a fire hazard.
2. A statute makes it unlawful to expose the Olympic Peninsula Forest to fire hazards.
3. The violation of a statute is negligence per se.⁴

By simply discussing these two statutes as an attempt to impose liability without fault and in ignoring the applicability of these statutes to the issue of negligence of the Forest Service employees, the court has ignored an important and highly relevant phase of the Washington statute law and Washington case law. In so doing the court also ignores its own holding in *Spokane International Railway Company v. United States*, 72 F. (2d) 440, (CCA 9th 1934), in which at page 442, the court pointed out that

"This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another."

⁴ *Conrad v. Cascade Timber Co.*, 166 Wash. 369, 7 P. (2d) 19.

IV.

Mis-interpretation of the Dalehite Case

Much space in appellants' briefs was devoted to a consideration of the *Dalehite* case. Cases were cited which hold that merely being engaged in a public function is no defense to liability of the United States.⁵ The facts in the *Dalehite* case were explained in detail and fully distinguished from those in the case at bar,⁶ and it was shown how the opinion's remarks regarding public firemen were dictum. Furthermore, the facts in the case at bar place it within the expressly recognized exceptions to the *Dalehite dictum*.⁷ Appellants reiterate this position in petitioning for rehearing, *en banc*.

⁵ See Appellants' Reply Brief, pp. 11-12.

⁶ See Appellants' Opening Brief, pp. 62-65.

⁷ See Appellants' Opening Brief, pp. 73-75.

CONCLUSION

In conclusion, Appellants submit that the departmental opinion at the outset made a major error of law in holding that liability for the prior acts and omissions as alleged in the complaint was foreclosed by the doctrine of intervening cause. By reaching this conclusion the court disposed of the legal arguments dealing with those earlier acts and omissions in a must summary manner. None of those arguments dealt with or are grounded on the duties of the servient owner toward the maintenance of an easement. The court cited the *Reed* case for a premise contrary to its holding. Equally serious is the court's cursory consideration of the fire hazard and Olympic Peninsula statutes which in themselves create a liability for negligently leaving combustible debris in the Olympic Forests.

Suffice it to say that these are only two of the grounds of liability in the earlier stages which should be given reconsideration once the doctrine of intervening cause is removed from the court's holding.

In addition, the court has mis-interpreted and mis-applied the holding in the *Dalehite* case.

On a motion for judgment on the pleadings, all well-pleaded allegations are deemed admitted.

It is submitted that Appellants should be accorded a rehearing *en banc*.

Respectfully submitted,

FERGUSON & BURDELL

W. H. FERGUSON

W. WESSELHOEFT

DONALD McL. DAVIDSON

Attorneys for Appellants

CERTIFICATE OF COUNSEL

The foregoing Petition for Rehearing is in my opinion well founded and is not interposed for delay.

W. WESSELHOEFT

No. 14331

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

ARTHUR A. ARNHOLD, et al., *Appellants*,

VS.

UNITED STATES OF AMERICA, *Appellee*.

SECOND PETITION FOR REHEARING

TO: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM T. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

RECEIVED

DEC 20 1955

PAUL P. O'BRIEN
CLERK

FERGUSON & BURDELL

W. H. FERGUSON

W. WESSELHOEFT

DONALD McL. DAVIDSON

Attorneys for Appellants

1012 Northern Life Tower,
Seattle 1, Washington



FRAYN PRINTING COMPANY



No. 14331

**UNITED STATES
COURT OF APPEALS**

For the Ninth Circuit

ARTHUR A. ARNHOLD, et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

SECOND PETITION FOR REHEARING

TO: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM T. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

FERGUSON & BURDELL

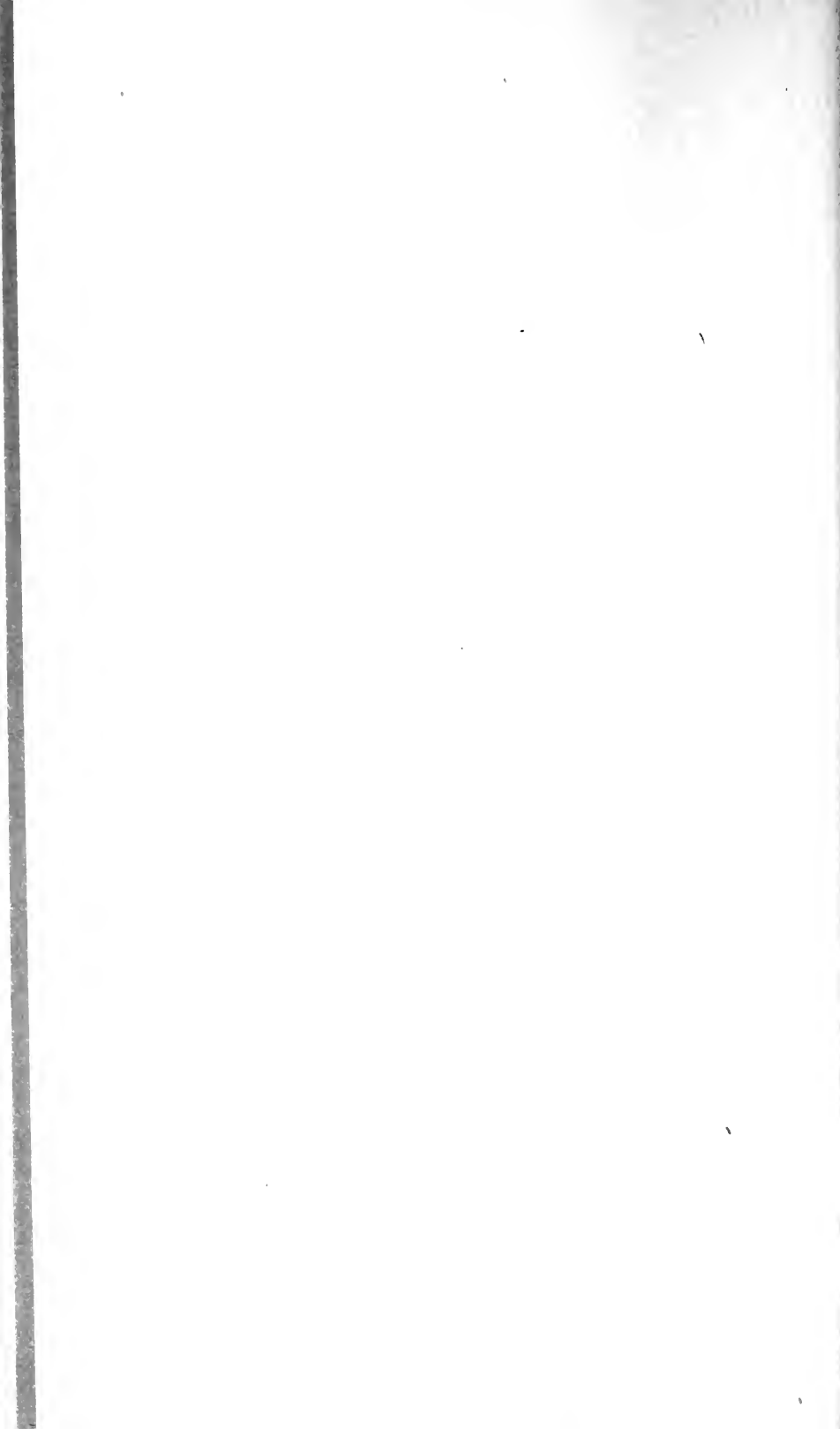
W. H. FERGUSON

W. WESSELHOEFT

DONALD McL. DAVIDSON

Attorneys for Appellants

1012 Northern Life Tower,
Seattle 1, Washington



No. 14331

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit

ARTHUR A. ARNHOLD, et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

SECOND PETITION FOR REHEARING

TO: THE HONORABLE HOMER T. BONE, *Circuit Judge*
THE HONORABLE WILLIAM T. ORR, *Circuit Judge*
THE HONORABLE WILLIAM T. HASTIE, *Circuit Judge*

COME NOW ARTHUR A. ARNOLD et al, Appellants herein, and respectfully petition the Court for a rehearing en banc of the decision entered herein on September 1, 1955.

I.

The ground upon which this Petition is based is the supervening decision of the Supreme Court of the United States in *Indian Towing Co. v. United States*, No. 8, October Term, 1955 (as yet unreported—printed in full in the Appendix, *infra* p. 1A).

II.

That case modified the Dalehite case—the basis of the decision herein—and requires a re-examination of the instant case to avoid a conflict in currently applicable law.

III.

This action was brought against the United States under the Tort Claims Act, 28 USCA § 1346 (b), §§2670—2680, to recover damages for a fire (a) originating on government-owned land as a result of the negligence of forest service employees, (b) negligently permitted to spread to adjoining government and private land and (c) negligently allowed to escape some six weeks later from that area, causing damage to appellants.

IV.

The following are the principal conflicts between the opinion in the case at bar and the *Indian Towing* case:

1. Public Function and Public Capacity Theory

(a) This Court held that control of conflagrations on forest land is a public function and exempts the Government from liability. 225 F. (2d) at 645.¹

The Supreme Court in the *Indian Towing* case rejected the public function theory, saying:

“The fact of the matter is that the theory

¹ Reference is made to the opinion of *Rayonier, Inc., v. U. S.*, companion case of the case at bar, for the reason that the case at bar, 225 F. (2d) 650, was decided “on authority of the *Rayonier* case * * *.” The appellant in the *Rayonier* case has likewise petitioned for a second rehearing.

whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for torts." (App. p. 4A-5A).

(b) This Court said "that the Government did no more than undertake to perform services in a public capacity," 225 F. (2d) at 646.

In the *Indian Towing* case the Supreme Court said:

"While the area of liability is circumscribed by certain provisions of the Federal Tort Claims Act, see 28 USC 2680, all Government activity is inescapably 'uniquely governmental' in that it is performed by the Government." (App. p. 7A); and

"On the other hand, it is hard to think of any Governmental activity on the 'operational level,' our present concern, which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, and could not conceivably be, privately performed." (App. p. 7A).

2. *Volunteer*

This Court held that the Government "may not be said to assume the common law obligation of a volunteer." 225 F. (2d) at 646.

The Supreme Court in the *Indian Towing* case, in speaking of the language of the Tort Claims act, said:

"It is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner." (App. p. 4A).

That Court also said that while the Coast Guard need not undertake the lighthouse service, if it did undertake to operate it, it was obligated to use due care; and if it failed in its duty and damage was caused thereby, the United States was liable under the Tort Claims Act. (App. p. 4A).

3. *Fire Fighting*

(a) This Court quoted with approval the following language from the *Dalehite* case:

"* * * If anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." 225 F. (2d) 645.

The Supreme Court in the *Indian Towing* case gave a hypothetical example of consecutive negligent acts which, among others, included producing a spark which set a fire and sank a barge, and indicated that the Government would be liable under the Tort Claims Act. (App. p. 5A-6A).

In the *Indian Towing* case the Supreme Court, in referring to the *Dalehite* case, said:

"The differences between this case and *Dalehite* need not be labored. The governing facts in *Dalehite* sufficiently emerge from the opinion in that case." (App. p. 9A).

The majority opinion contained a footnote, moreover, which stated:

"The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding 'there is no analogous

liability * * * in the law of the torts. 346 U. S. at 44. But see *Workman v. New York City*, 179 U. S. 552." (App. p. 9A, N. 4).

The *Workman* case cited in the footnote held the City of New York liable for damages caused by a fireboat on its way to a fire.

The dissenting opinion in the *Indian Towing* case recognized the import of the majority opinion insofar as it would affect fire fighting, by saying:

"The overall impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of 'any governmental activity on the operational level.' It seems broad enough to cover all so-called 'uniquely governmental activities.' Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled."⁹

(b) The Court in the case at bar quoted with approval the following language from the *Dalehite* case:

"That cities, by maintaining fire fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched." 225 F. (2d) at 645

The Supreme Court in the *Indian Towing* case held that to read the Tort Claims Act,

"as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private concern, * * * would thus push the courts into the 'governmental' — 'non-governmental' quagmire that has long

⁹ But see footnote (3) of the majority opinion in which *Workman v. New York City* is cited. (App. p. 16A)."

plagued the law of municipal corporations.” (App. p. 4A).

(c) This Court quoted with approval the following language from the *Dalehite* case:

“It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights.” 225 F. (2d) at 645.

The Supreme Court in the *Indian Towing* case listed the statutory exceptions to the Tort Claims Act and then said:

“The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not leave just treatment to the caprice and legislative burden of individual private laws.” (App. p. 8A).

4. *Analogous Liability*

This Court quoted with approval:

“The Act did not create new causes of action where none existed before. * * * *Feres v. United States*, 340 U. S. 135 * * *” 225 F. (2d) at 645.

The Supreme Court in the *Indian Towing* case said:

“*Feres* held only that ‘the Government is not liable under the Federal Tort Claims Act for injuries to servicemen when the injuries arise out of or are in the course of activity incident service’. * * * .” (App. p. 9A).

and

“* * * This Court would be attributing bizarre

motives to Congress to assert that it was predicating liability on such a completely fortuitous circumstance—the presence or absence of identical private activity.” (App. p. 6A).

V.

In summarily dismissing the *Dalehite* case on the basis of its facts, limiting the *Feres* case, and citing the *Workman* case with approval, the Supreme Court clearly indicated that the doctrine of the *Feres* and *Dalehite* cases should not be extended to other cases. On December 5, 1955, the Supreme Court affirmed per curiam *Eastern Air Lines v. Union Trust Company*, 221 F. (2d) 62, on the authority of the *Indian Towing* case. The decision rejected the argument that *Dalehite* excluded liability for “governmental functions of a regulatory nature” of CAB airport control tower employees. (221 F. (2d) at p. 73).

Here a portion of the 1600 acre area that smoldered for six weeks was government-owned, and the Government’s fire fighting equipment and facilities were alleged to be no different than that of other adjacent owners. (R. 9-10, Par. XIII) Other distinguishing facts are that in *Dalehite* there was a substantial question whether or not the Coast Guard ever actually undertook to fight the fire or had notice of it,² and even if it did so, it was fighting a fire aboard a French ship in cargo belonging to private individuals.

² “State and municipal authorities took and retained charge of fire-fighting and disaster-control measures at the time of the disaster.” Brief for the United States, p. 170, n. 8 *Dalehite v. United States*.

“The *Grandcamp* exploded about an hour after the fire was noticed.” *Dalehite v. United States*, 346 U. S. 15, p. 23, n. 7.

VI.

For many years prior to passage of the Federal Tort Claims Act, Congress in every session passed numerous bills compensating government employees and citizens for property destroyed by fire.

Such bills included awards of damages to adjoining timber owners as a result of a forest fire originating on a Government migratory game refuge,³ conferred jurisdiction upon a district court to hear claims of numerous occupants of a building for damages from a fire allegedly started from an oil stove in part of the building occupied by the W.P.A.,⁴ damages arising out of fires in National Forests and National Parks,⁵ fire damages arising out of negligence in clearing banks of a stream,⁶ and the destruction by fire of a barn caused by W.P.A. workers burning brush on a nearby road.⁷

VII.

It has become apparent that the Supreme Court in the *Indian Towing* case has promptly realized the confusion caused by the *Dalehite* decision and has restated the principles which determine the liability of the Government for torts. While the *Dalehite* case was not expressly overruled, it is apparent

³ 49 Stat. 2194 C. 787 August 27, 1955 (conferring jurisdiction on District Court); 54 Stat. 1351 C. 680 August 13, 1940 (acknowledging District Court decision of \$33,138.00 liability); 61 Stat. 974 C. 137 June 25, 1947 (authorizing payments of sums to other claimants "as a result of the forest fire or fires.")

⁴ 55 Stat. 958 C. 442 October 14, 1941.

⁵ 62 Stat. 1417 C. 796 July 1, 1948; 58 Stat. 999 C 313 June 28, 1944; 57 Stat. 651 C. 34 April 8, 1943; 56 Stat. 1216 C. 665 December 2, 1942.

⁶ 55 Stat. 944 C. 324 July 24, 1941.

⁷ 55 Stat. 905 C. 109 May 12, 1941.

that it no longer is authority for many of the legal concepts it enunciates.

VIII.

Both the District Court and this Court dismissed the case at bar on the authority of the *Dalehite* and *Feres* cases. The Supreme Court has now reversed its holding in the *Dalehite* case that the Coast Guard cannot be held liable for nonfeasance. This Court should re-examine the issues in the case at bar in the light of the *Indian Towing* opinion. Failure to grant appellants a rehearing will preclude them from their day in court.

APPELLANTS PRAY that their Second Petition for Rehearing be granted.

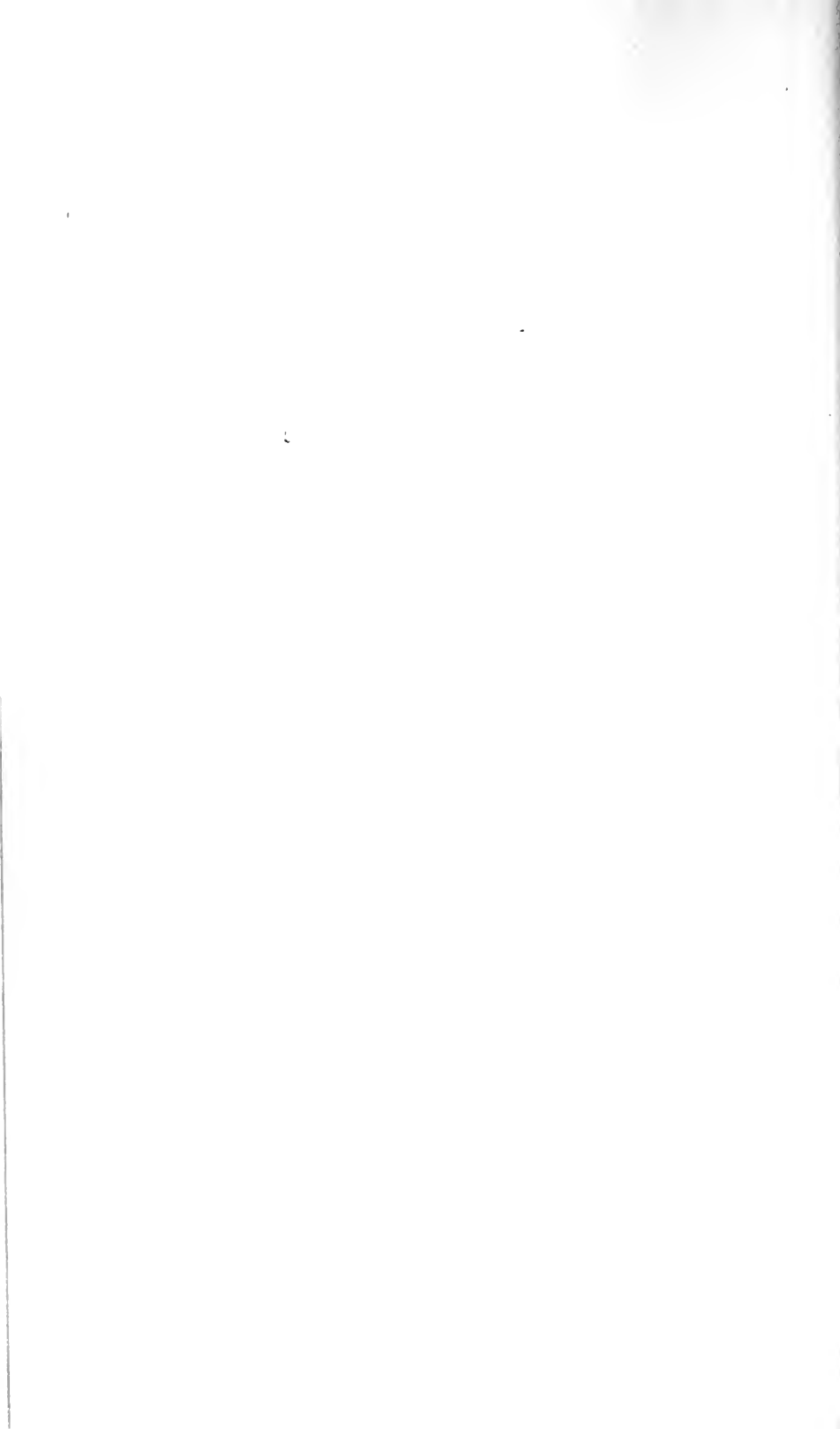
FERGUSON & BURDELL
W. H. FERGUSON
W. WESSELHOEFT
DONALD McL. DAVIDSON
Attorneys for Appellants

1012 Northern Life Tower
Seattle 1, Washington

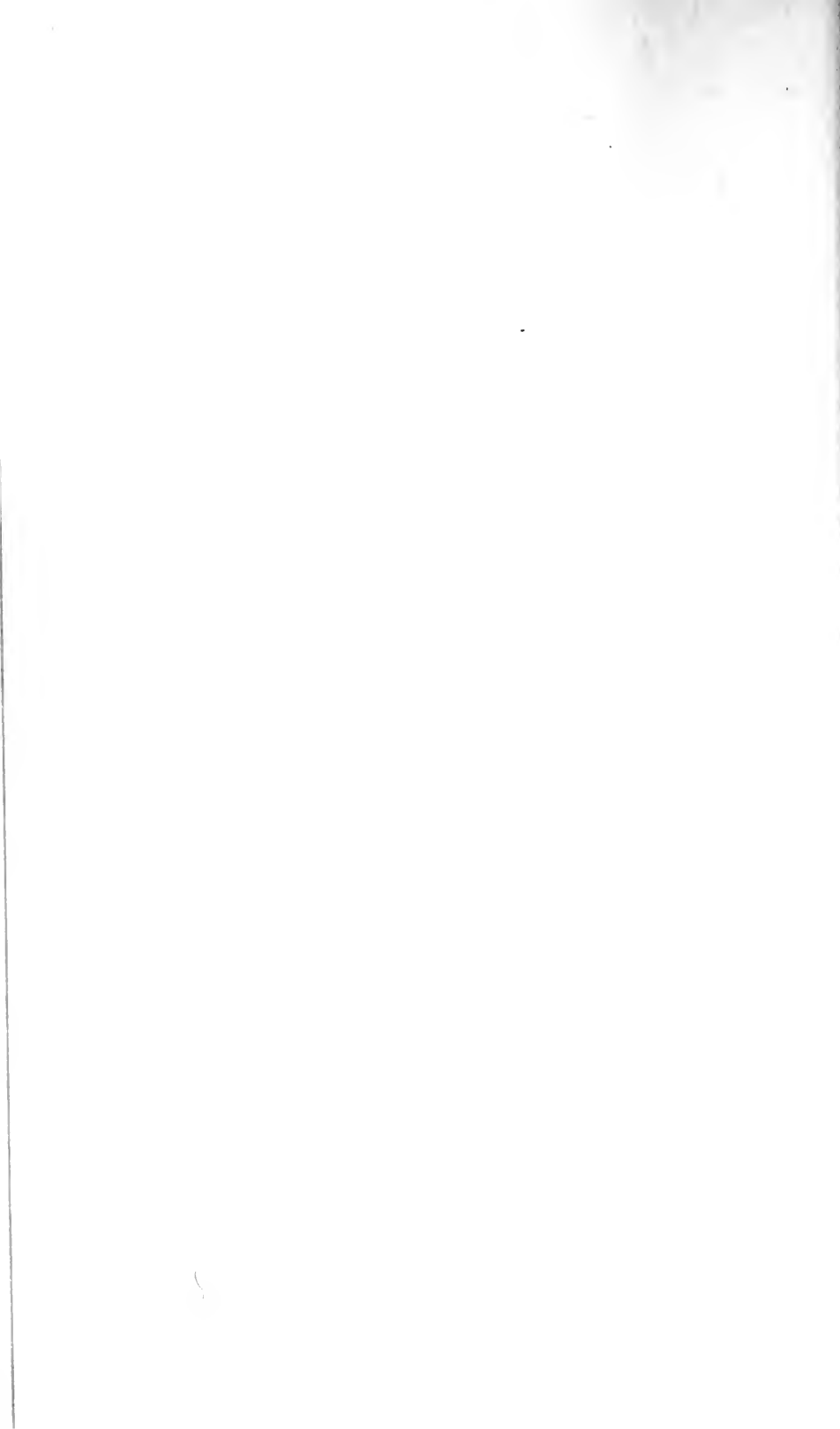
CERTIFICATE

DONALD McL. DAVIDSON, one of the counsel for appellants herein, hereby certifies that in his judgment the foregoing motion for leave to file a Second Petition for Rehearing and the foregoing Second Petition for Rehearing are well founded and that they are not interposed for delay.

DONALD McL. DAVIDSON



Appendix



SUPREME COURT OF THE UNITED STATES

No. 8—OCTOBER TERM, 1955.

Indian Towing Company, Inc., et al., Petitioners, v. United States of America.	} On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
---	---

[November 21, 1955.]

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Petitioners brought suit in the United States District Court for the Southern District of Mississippi, seeking recovery under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b), for damages alleged to have been caused by the negligence of the Coast Guard in the operation of a lighthouse light. They alleged that on October 1, 1951, the tug Navajo, owned by petitioner Indian Towing Company, was towing Barge AS-16, chartered by petitioner Upper Mississippi Towing Corporation; that the barge was loaded with a cargo of triple super phosphate, consigned to petitioner Minnesota Farm Bureau Service Company and insured by petitioner United Firemen's Insurance Company; that the tug Navajo went aground on Chandeleur Island and as a result thereof sea water wetted and damaged the cargo to the extent of \$62,659.70; that the consignee refused to accept the cargo; that petitioners Indian Towing Company and Upper Mississippi Towing Corporation therefore became responsible for the loss of the cargo; and that the loss was paid by petitioner United Firemen's Insurance Company under loan receipts. The complaint further stated that the grounding of the Navajo was due solely to the failure of the light on Chandeleur Island which in turn was caused by the negligence of the Coast Guard. The specific acts of negligence [1] relied on

2A

were the failure of the responsible Coast Guard personnel to check the battery and sun relay system which operated the light; the failure of the Chief Petty Officer who checked the lighthouse on September 7, 1951, to make a proper examination of the connections which were "out in the weather"; the failure to check the light between September 7 and October 1, 1951; and the failure to repair the light or give warning that the light was not operating. Petitioners also alleged that there was a loose connection which could have been discovered upon proper inspection.

On motion of the respondent the case was transferred to the United States District Court for the Eastern District of Louisiana, New Orleans Division. Respondent then moved to dismiss on the ground that it had not consented to be sued "in the manner in which this suit is brought" in that petitioners' only relief was under the Suits in Admiralty Act, 41 Stat. 525, or the Public Vessels Act, 43 Stat. 1112. This motion was granted and the Court of Appeals for the Fifth Circuit affirmed *per curiam*. 211 F. 2d 886. Because the case presented an important aspect of the still undetermined extent of the Government's liability under the Federal Tort Claims Act, we granted certiorari, 348 U. S. 810. The judgment of the Court of Appeals was affirmed by an equally divided Court, 349 U. S. 902, but a petition for rehearing was granted, the earlier judgment in this Court vacated, and the case restored to the docket for reargument before the full Bench. 349 U. S. 926.

The relevant provisions of the Federal Tort Claims Act are 28 U. S. C. §§ 1346 (b), 2674, and 2680 (a):

§ 1346 (b). ". . . the district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, ac-

cruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any em [21] ployee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

§ 2674. "The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

§ 2680. "The provisions of this chapter and section 1346 (b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

The question is one of liability for negligence at what this Court has characterized the "operational level" of governmental activity. *Dalchite v. United States*, 346 U. S. 15, 42. The Government concedes that the exception of § 2680 relieving from liability for negligent "exercise of judgment" (which is the way the Government paraphrases a "discretionary function" in § 2680 (a)) is not in-

volved here, and it does not deny that the Federal Tort Claims Act does provide for liability in some situations on the "operational level" of its activity. But the Government contends that the language of § 2674 (and the implications of § 2680) imposing liability "in the same **[3]** manner and to the same extent as a private individual under like circumstances" must be read as excluding liability in the performance of activities which private persons do not perform. Thus, there would be no liability for negligent performance of "uniquely governmental functions." The Government reads the statute as if it imposed liability to the same extent as would be imposed on a private individual "under the same circumstances." But the statutory language is "under like circumstances," and it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his "good samaritan" task in a careful manner.

Furthermore, the Government in effect reads the statute as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the courts into the "governmental"—"non-governmental" quagmire that has long plagued the law of municipal corporations. A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound. The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. The Federal Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by cov-

erly embedding the casuistries of municipal liability for torts.¹ [4]

While the Government disavows a blanket exemption from liability for all official conduct furthering the "uniquely governmental" activity in any way, it does claim that there can be no recovery based on the negligent performance of the activity itself, the so-called "end-objective" of the particular governmental activity. Let us suppose that the Chief Petty Officer going to inspect the light on Chandeleur Island first negligently ran over a pedestrian in a Coast Guard car; later, while he was inspecting the light, he negligently tripped over a wire and injured someone else; he then forgot to inspect an outside connection and that night the patently defective connection broke and the light failed, causing a ship to go aground and its cargo of triple super phosphate to get wet; finally the Chief Petty Officer on his way out of the lighthouse touched a key to an uninsulated wire to see

¹A good illustration of the effort of a conscientious court to reconcile the irreconcilable is *Haley v. City of Boston*, 191 Mass. 291, 77 N. E. 888. For an example of the confusion prevailing in one jurisdiction, compare *District of Columbia v. Woodbury*, 136 U. S. 450 (municipal corporation liable for injuries caused by negligent failure to keep sidewalk in repair) with *Harris v. District of Columbia*, 256 U. S. 650 (municipal corporation not liable for injuries caused by negligent sprinkling of streets). But even in the law of municipal corporation and state liability, one State at least has sought to emerge from the quagmire. See the more recent New York cases: *Foley v. State of New York*, 294 N. Y. 275, 62 N. E. 2d 69 (State liable when negligent failure to replaced burned-out bulb in traffic light caused accident); *Bernardine v. City of New York*, 294 N. Y. 361, 62 N. E. 2d 604 (city liable in negligence action for damages caused by runaway police horse). When the confused law of municipal corporations is applied to the Tort Claims Act, the same type of results occur. Compare the holding of the Court of Appeals for the Fifth Circuit in the instant case, 211 F. 2d 886, with its holding in *United States v. Lawter*, 219 F. 2d 559 (United States liable under Tort Claims Act for negligence of Coast Guard during helicopter rescue operation).

tions, see § 2680 (a)–(m).³ For administrative safeguards, see § 2401 (b) (statute of limitations); § 2402 (denial of trial by jury); § 2672 (administrative adjustment of claims of \$1,000 or less); § 2673 (reports to Congress); § 2674 (no liability for punitive damages or for interest prior to judgment); § 2675 (disposition by **[7]** federal agency as prerequisite to suit when claim is filed); § 2677 (compromise); § 2679 (exclusiveness of remedy).) The language of the statute does not support the Government's argument. Loose general statements in the legislative history to which the Government points seem directed mainly toward the "discretionary function" exemption of § 2680 and are not persuasive. The broad and just purpose which the statute was designed to effect was to compensate the victims of negligence in the conduct of governmental activities in circumstances like unto those in which a private person would be liable and not to leave just treatment to the caprice and legislative burden of individual private laws. Of course, when dealing with a statute subjecting the Government to liability for potentially great sums of money, this Court must not promote profligacy by careless construction. Neither should it as a self-constituted guardian of the Treasury import immunity back into a statute designed to limit it.

The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order, and if the light did become extinguished, then

³ Congress significantly withheld liability for claims relating, *inter alia*, to the postal service, tax collection, quarantine establishment, fiscal operations, combatant activities of the Coast Guard during time of war, and the activities of the TVA.

the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

The Court of Appeals for the Fifth Circuit considered *Feres v. United States*, 340 U. S. 135, and *Dalehite v. United States*, 346 U. S. 15, controlling. Neither case is applicable. *Feres* held only that "the Government is not liable under the Federal Tort Claims Act for injuries to servicement when the injuries arise out of or are in [8] the course of activity incident to service. Without exception, the relationship of military personnel to the Government has been governed exclusively by federal law." 340 U. S., at 146. And see *Brooks v. United States*, 337 U. S. 49. The differences between this case and *Dalehite* need not be labored. The governing factors in *Dalehite* sufficiently emerge from the opinion in that case.⁴

The judgment of the Court of Appeals is reversed and the case is remanded to the District Court for further proceedings.

⁴The Court in *Dalehite* disposed of a claim of liability for negligence in connection with fire fighting by finding that "there is no analogous liability . . ." in the law of torts. 346 U. S., at 44. But see *Workman v. New York City*, 179 U. S. 552.

SUPREME COURT OF THE UNITED STATES

No. 8—OCTOBER TERM, 1955.

Indian Towing Company, Inc., et al., Petitioners, <i>v.</i> United States of America.	}	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.
--	---	---

[November 21, 1955.]

MR. JUSTICE REED, with whom MR. JUSTICE BURTON, MR. JUSTICE CLARK, and MR. JUSTICE MINTON join, dissenting.

The Court reverses the judgement on the ground that the United States is liable under the Federal Tort Claims Act for damages caused by the negligence of the Coast Guard in maintaining a lighthouse light near the mouth of the Mississippi. The alleged negligence was the failure of the Coast Guard personnel to check the electrical system which operated the light, the failure to make a proper examination of the connections and other apparatus connected with the light, and the failure to repair the light or give notice to vessels that the light was not functioning. Although navigators were warned this was an "unwatched light,"¹ it is assumed at this point in the litigation that this negligence occurred and that it was the proximate cause of the loss. Government operation of the lighthouse was authorized by 14 U. S. C. § 81. It is forbidden to others except by authority of the Coast Guard.² [11]

¹United States Coast Guard. Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158). pp. 5. 498.

²14 U. S. C. § 83:

"No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from

The question of the liability of the United States for this negligence depends on the scope and meaning of the Federal Tort Claims Act. The history of the adoption of that Act has heretofore been thoroughly explained.³ Before its enactment, the immunity of the Government from such tort actions was absolute. The Act authorized suits against the Government under certain conditions.

[2]

the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined not more than \$100 for each offense. Each day during which such violation continues shall be considered as a new offense."

The Government advises that as of June 30, 1953, government aids to navigation numbered 38,169; authorized private aids 3,301. Aids to Navigation Operated and Maintained by the United States and Coast Guard (June 30, 1953) pp. 1, 12.

We are further advised:

"The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127. 1945) p. 1201]:

"(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

"(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or contractor's, vessels.

"(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

"See also, U. S. Coast Guard, *Aids to Navigation Manual* (CG-222, Jan. 1953), pp. 4-1, 4-3.

"Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) § 68.01-1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01-1."

³*Feres v. United States*. 340 U. S. 135; *Dalehite v. United States*, 346 U. S. 15.

The Government was made liable for injury to persons or property.

“caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U. S. C. § 1346 (b).

There was a further condition, 28 U. S. C. § 2674, that the United States should be liable “in the same manner and to the same extent as a private individual under like circumstances.”⁴

In *Feres v. United States*, 340 U. S. 135, we passed upon the applicability of the Act to claims by members of the armed services injured through the negligence of other military personnel.⁵ We said:

“One obvious shortcoming in these claims is that plaintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability ‘under like circumstances,’ for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of com-

⁴There were further limitations and certain specific exceptions not pertinent here.

⁵*E. g.*, the negligence of an army surgeon during an operation in sewing up a towel in the abdomen of a soldier; and negligence in quartering a soldier in barracks known to be unsafe because of a defective heating plant.

[3] mand. . . In the usual civilian doctor and patient relationship, there is of course a liability for malpractice. And a landlord would undoubtedly be held liable if an injury occurred to a tenant as the result of a negligently maintained heating plant. But the liability assumed by the Government here is that created by 'all the circumstances,' not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Id.*, at 142.

Thus, in *Feres* the Court was of the view that the Act does not create new causes of action theretofore beyond the applicable law of torts. So, in determining whether an action for negligence in maintaining public lights is permissible, we must consider whether similar actions were allowed by the law of the place where the negligence occurred, prior to the Tort Claims Act, against public bodies otherwise subject to suit.

Dalehite v. United States, 346 U. S. 14, 42, followed the reasoning of *Feres*. That case involved, among other issues, the liability of the United States for negligence of the Coast Guard in fighting fire. The Coast Guard had been found negligent in its fire-fighting duties by the trial court. These duties were outside the discretionary function exception of § 2680 (a) of the Act. Resting our decision on the Act itself, we said the Tort Act

"did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was

there stated, limited United States liability to 'the [4] same manner and to the same extent as a private individual under like circumstances.' 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire." *Id.*, at 43-44.

These two interpretive decisions have not caused Congress to amend the Federal Tort Claims Act. As a matter of fact the catastrophe that gave rise to the *Dalehite* case was subsequently presented to Congress for legislative relief by way of compensation for the losses which resulted, as found by the trial court, partly from the negligence of the Coast Guard. Throughout the reports discussion and enactment of the relief act, there was no effort to modify the Tort Act so as to change the law, in any respect, as interpreted by this Court in *Feres* and *Dalehite*.⁶ Although its discussion was restricted solely to the discretionary function exception to the Act, Congress must have accepted the rulings relating to the issues here involved as in accord with its understanding of the Tort Act. One cannot say that when a statute is interpreted by this Court we must follow that interpretation in subsequent cases unless Congress has amended the statute. On this our cases conflict.⁷ However, we should continue to hold, as a matter of *stare decisis* and as the normal rule, that in-

⁶Pub. Law No. 378, 84th Cong., 1st Sess.; H. R. Rep. No. 2024, 83d Cong., 2d Sess.; S. Rep. No. 2363, 83d Cong., 2d Sess.; H. R. Rep. No. 1305, 84th Cong., 1st Sess.; H. R. Rep. No. 1623, 84th Cong., 1st Sess.; S. Rep. No. 684, 84th Cong., 1st Sess.

⁷Compare *United States v. Elgin R. Co.*, 299 U. S. 492, 500; *United States v. South Buffalo R. Co.*, 333 U. S. 771, 775; *Toolson v. New York Yankees*, 346 U. S. 356, with *Helvering v. Hallock*, 309 U. S. 106; *Commissioner v. Church*, 335 U. S. 632.

action of Congress, after a well-known and important decision of common knowledge, is **[5]** “an aid in statutory construction . . . useful at times in resolving statutory ambiguities.” *Helvering v. Reynolds*, 313 U. S. 428, 432. The non-action of Congress should decide this controversy in the light of the previous rulings. The reasons which led to the conclusions against creating new and novel liabilities in the *Feres* and *Dalehite* cases retain their persuasiveness.

This enactment, like any other, should be construed so as to accomplish its purpose, but not with extravagant generosity so as to make the Government liable in instances where no liability was intended by Congress. It is certainly not necessary that every word in a statute receive the broadest possible interpretation. If Congress intended to create liability for all incidents not theretofore actionable against suable public agencies, that intention should be made plain. The courts are not the legislative branch of the Government.

The Act made the Government liable in instances where it would be suable “if a private person.” The meaning of “private person” is not discussed in the legislative history. In *Feres* we talked of private liability and came to a conclusion which is contrary to that reached by the Court today. See pp. 3—4, *supra*. We held that because surgeons in private practice or private landlords were liable for negligence did not mean the United States was. Liability of governments for the failure of lighthouse warning lights is as unknown to tort law as, for example, liability for negligence in fire fighting excluded by the *Dalehite* ruling. Lighthouse keeping is as uniquely a governmental function as fire fighting. There is at least some uncertainty and ambiguity as to what Congress meant by making the United States liable in circumstances

where it would be liable "if a private person." That uncertainty should not lead us to accept liability for the United States in this case. In dealing with this [6] enlarged concept of federal liability for torts, wisdom should dictate a cautious approach along the lines of *Feres* and *Dalehite*.

The Act says that the United States shall be liable in accordance with the law of the place where the act or omission occurred. § 1346 (b). This alleged tort occurred in Louisiana. Under the Louisiana law a municipal corporation is not responsible for injury sustained as a result of negligence on the part of the employees of a city in the maintenance of traffic lights.⁸ Street traffic lights are a close analogy to navigation lights. We can see no reason to doubt that under Louisiana law the maintenance of navigation lights if permissible by municipalities would likewise be free of liability. The Court warns us against the morass of decisions that involve municipal tort liability. It calls that law a "quagmire" and avoids it by a complete surrender of sovereign immunity without regard to the law of municipal liability of the respective States.

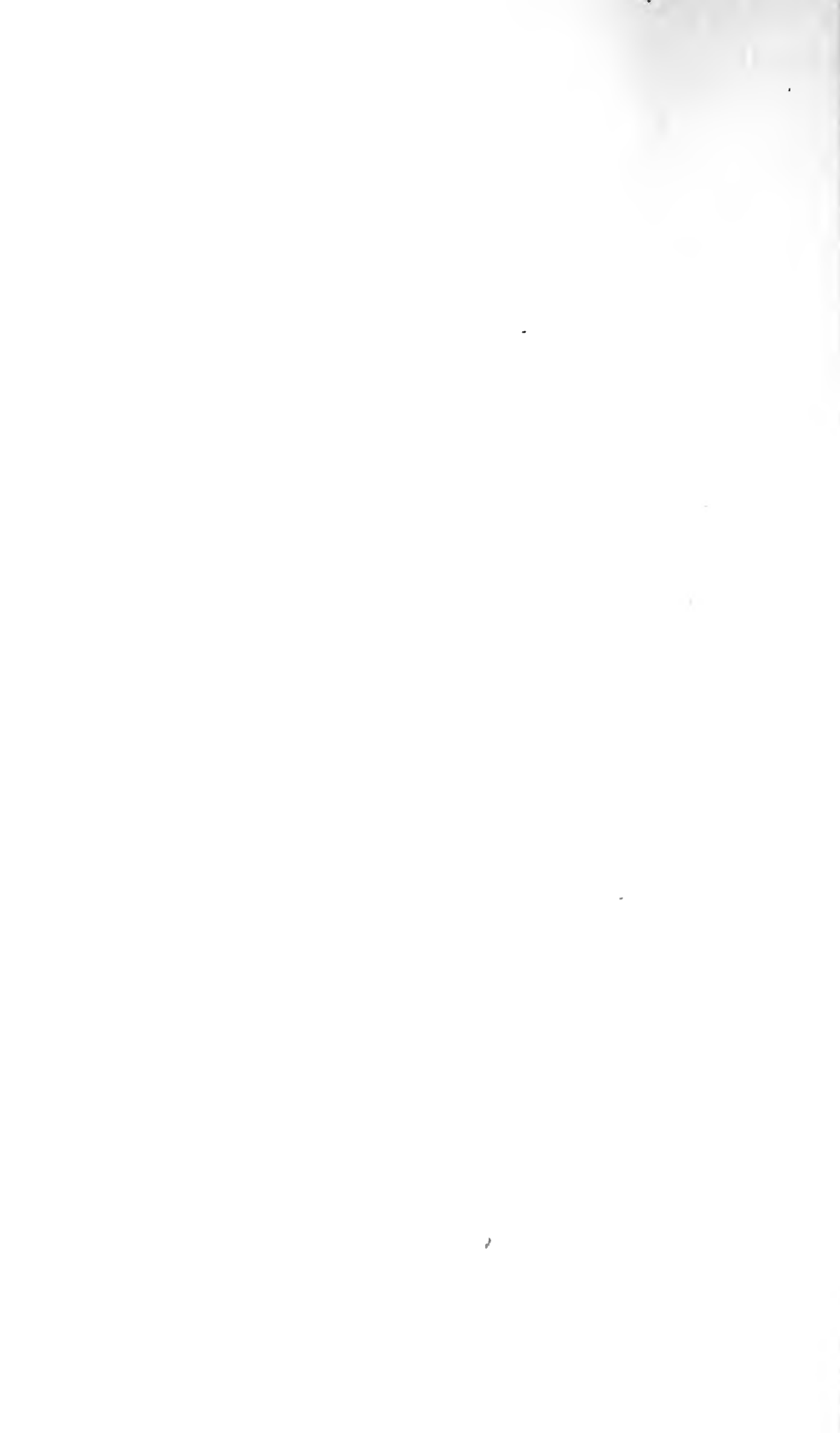
The overall impression from the majority opinion is that it makes the Government liable under the Act for negligence in the conduct of "any governmental activity on the 'operational level.'" It seems broad enough to cover all so-called "uniquely governmental activities." Logically it may cover negligence in fire fighting, although the *Dalehite* holding on that point is not overruled.⁹ Per-

⁸*Edwards v. City of Shreveport*, 66 So. 2d 373; cf. *Howard v. City of New Orleans*, 159 La. 443, 105 So. 443.

⁹But see footnote 3 of the majority opinion in which *Workman v. New York City* is cited.

haps liability arises even for injuries from negligence in pursuing criminals.

The Court's literal interpretation of this Act brings about an application of the Federal Tort Claims Act analogous to that condemned by Congress in the Portal **[7]** to Portal Act of 1947 after *Andersen v. Mt. Clemens Pottery Co.*, 328 U. S. 680, see 61 Stat. 84, § 1 (a), and in the Fair Labor Standards Amendments of 1949, 63 Stat. 910, after *Bay Ridge Co. v. Aaron*, 334 U. S. 446, see 2 U. S. Code Cong. Serv. (1949) 1617. Compare *United States v. American Trucking Assn's*, 310 U. S. 534. The judgment should be affirmed.



No. 14331

**UNITED STATES
COURT OF APPEALS**
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLANTS' REPLY BRIEF

FERGUSON & BURDELL,

W. H. FERGUSON,

W. WESSELHOEFT,

DONALD McL. DAVIDSON,

Attorneys for Appellants.

1012 Northern Life Tower,
Seattle 1, Washington

FILED

OCT 30 1954

PAUL P. O'BRIEN,

CLERK



No. 14331

**UNITED STATES
COURT OF APPEALS**

for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLANTS' REPLY BRIEF

FERGUSON & BURDELL,

W. H. FERGUSON,

W. WESSELHOEFT,

DONALD McL. DAVIDSON,

Attorneys for Appellants.

1012 Northern Life Tower,
Seattle 1, Washington

INDEX

	Page
I.	
A. <i>The Railroad Did Not Acquire, Hold Or Use Its Right-of-Way As Stated By Appellee</i>	1
B. <i>At Common Law The Owner Of A Servient Estate Having A Right Of Entry To Repair Has A Duty To Third Persons To Exercise Such Rights</i>	2
C. <i>Appellee Had Reserved A Right To Enter Upon The Right-of-Way And Abate Combustibles And Therefore Had All Of The Incidents Of Ownership Of An Owner, Operator Or Person In Possession Of The Right-of-Way</i>	6
II.	
A. <i>This Court Has Decisively Disposed Of Appellee's Argument That Liability For Negligence May Not Be Predicated Upon Violation Of Criminal Statute</i>	8
B. <i>The Rights, Duties And Liabilities As Between Appellee And The Railroad Are Immaterial In This Appeal</i>	8

C. <i>The Complaint Clearly Alleges That Appellee's Violation Of The Statute In Causing An Accumulation Of Slashings Was A Proximate Cause Of The Damage</i>	9
--	---

III.

A. <i>The Forest Service Acts In The Same Fashion As The Owner Of Any Forest And Was Not Fighting This Fire As A Public Fireman</i>	9
B. <i>The Tort Claims Act Contains No Exclusion For Negligence In The Performance Of A Public Function</i>	10
C. <i>The United States Is Liable To Appellants Under Its Fire Protection Agreement</i>	14
D. <i>Appellee Cannot Avoid Private Duties By Alleging Negligence In The Performance Of A Public Duty</i>	14

CONCLUSION	18
------------------	----

TABLE OF AUTHORITIES

CASES

	Page
<i>Appel v. Muller</i> , 186 N. E. 785, 262 N. Y. 278 (Ct. App. 1933).....	4
<i>Boggess v. King County</i> , 150 Wash. 578, 274 Pac. 188.....	5
<i>Canadian Aviator, Ltd. v. United States</i> , 324 U. S. 215, 89 L. Ed. 901, 65 S. Ct. 639 (1945).....	11
<i>Conry v. Baltimore & O. R. Co.</i> , 209 F. (2d) 423 (CCA 3rd 1953).....	3
<i>Doherty v. Oakland Beach Volunteer Fire Company</i> , 70 R. I., 446, 40 A. (2d) 737 (Sup. Ct. 1944).....	14
<i>Galbraith v. Wheeler-Osgood Co.</i> , 123 Wash. 229, 212 Pac. 174	15
<i>General Cocoa Co. v. United States</i> , 149 F. (2d) 815, (CCA 9th 1945).....	12
<i>Gilroy v. United States</i> , 112 F. Supp. 664 (D. C. D. C. 1953)....	13
<i>Hentz v. Toppin</i> , 77 N. E. (2d) 229, 322 Mass. 333 (1948).....	3
<i>Hillstrom v. City of St. Paul</i> , 134 Minn. 451, 159 N. W. 1076 (1916)	15
<i>Moran Towing & Transp. Co. v. United States</i> , 80 F. Supp. 623 (S. D. N. Y. 1948).....	11
<i>Nashville C. & St. L. Railroad v. Nants</i> , 65 S. W. (2d) 189, 167 Tenn. 1.....	9
<i>Northern Pac. Ry. Co. v. Mentzer</i> , 214 F. (2d) 10 (CCA 9th 1914)	6
<i>O. F. Nelson & Co. v. United States</i> , 149 F. (2d) 692 (CCA 9th 1945)	12, 15
<i>O'Toole et al v. United States</i> , 206 F. (2d) 912 (CCA 3rd 1953)	13
<i>Reed v. Allegheny Co.</i> , 330 Pa. 300, 199 Atl. 187.....	2
<i>Rodriguez v. United States</i> , 204 F. (2d) 508 (CCA 3rd 1953)....	11
<i>The Sobreski</i> , 81 Lloyds List L. R. 61.....	12
<i>Spokane International Ry. Co. v. United States</i> , 72 F. (2d) 440 (CCA 9th 1934).....	8
<i>Spokane v. Fisher</i> , 106 Wash. 378, 180 Pac. 139.....	5
<i>Stephens v. Mutual Lumber Co.</i> , 103 Wash. 1, 173 Pac. 1031.....	9
<i>United States v. The Australian Star</i> , 172 F. (2d) 472 (CCA 2d 1949) cert. denied 338 U. S. 823, 94 L. Ed. 499, 70 S. Ct. 69 6, 12	
<i>Voltz v. Orange Volunteer Fire Association</i> , 118 Conn. 307, 172 Atl. 220 (Sup. Ct. 1934).....	14
<i>Wood & Iverson, Inc. v. Northwest Lumber Co.</i> , 138 Wash. 203, 244 Pac. 712.....	15
<i>Woolworth Co. v. Seattle</i> , 104 Wash. 629, 177 Pac. 664.....	9

TEXTS

	<i>Page</i>
89 A.L.R. 480, 484.....	3-4
18 McQuillan on Municipal Corporations, p. 371, § 53.82.....	14

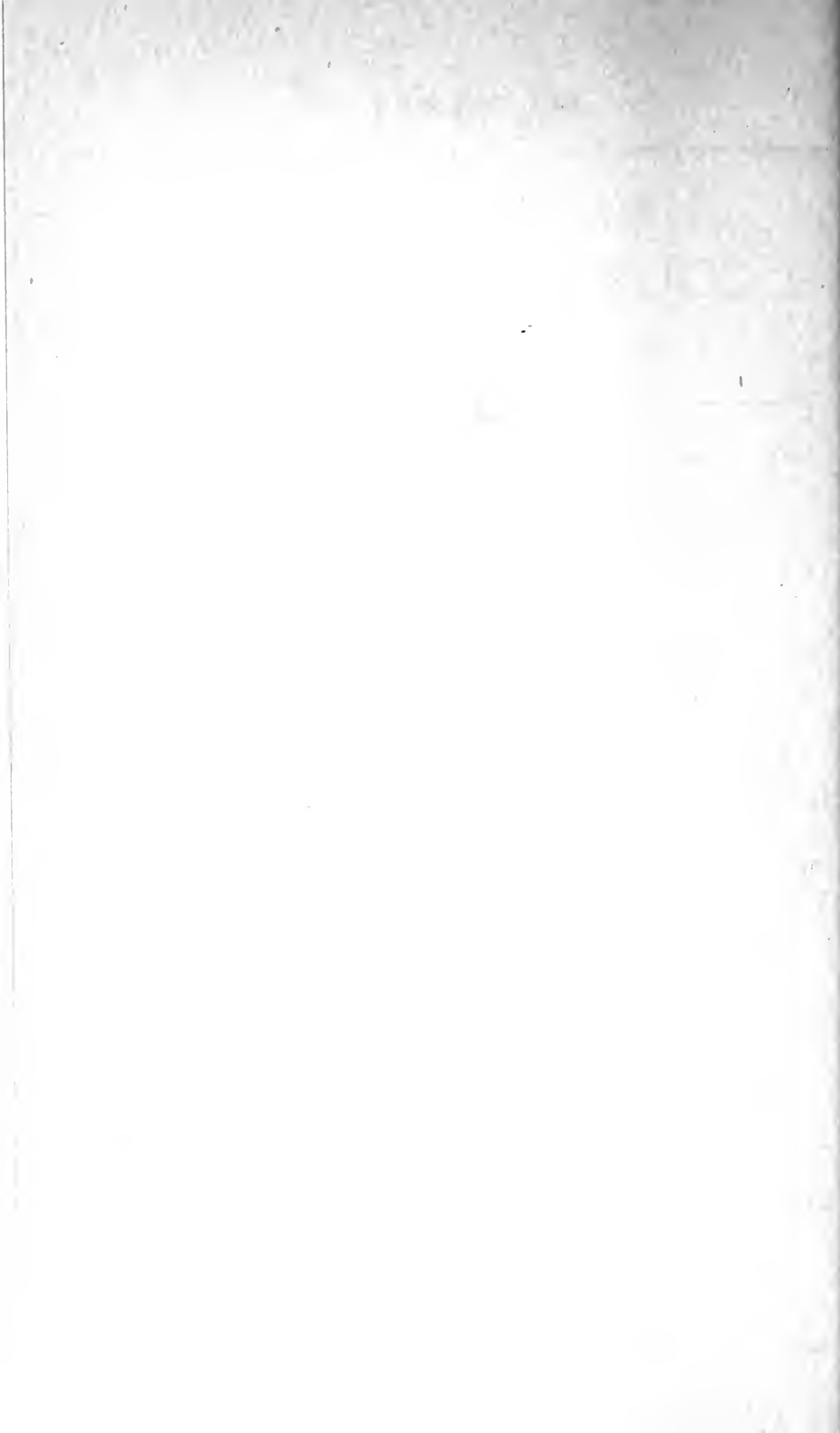
STATUTES

Washington Statutes

	<i>Page</i>
RCW 76.04.450 (Rem. Rev. Stat., § 5818).....	7
RCW 76.04.380 (Revision of Rem. Rev. Stat., § 5806) (1945) ..	7

United States Statutes

	<i>Page</i>
43 USC § 934	1
46 USC § 781	11



UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

ARTHUR A. ARNOLD, et al, *Appellants*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPELLANTS' REPLY BRIEF

Appellee's brief fails to discuss numerous allegations of the complaint, makes inferences contrary to it and in favor of the government and propounds rules of law and cases that are wholly immaterial to this appeal.

These errors are as follows:

I. A. *The Railroad Did Not Acquire, Hold Or Use Its Right Of Way As Stated By Appellee*. (Appellee's Brief, p. 8-10).

The record does not support the statement that the Railroad had an easement over public lands pursuant to the Right of Way Act of March 3, 1875 (18 Stat. 482, 43 U.S.C. 934), and the assertion is erroneous in fact.

The complaint alleges that the right of way was "owned . . . by defendant United States," that it knew of the accumulated debris, "had the right to

abate the same or cause the same to be abated” and “had reserved the right to do so and had done so at various time previous thereto” (R. 8). The Complaint also alleges appellee knew the railroad was not operating with a follow-up patrol, but “did not require such a patrol . . . although it had reserved the right to do so and in the exercise of reasonable care it should have done so.” (R. 8).

These allegations do not sustain the inference that the railroad had an easement under the Act cited. Normal railroad easements do not give the grantor any rights to require the grantee to abate a nuisance or to enter and abate it if the grantee fails to do so or give the grantor any rights whatever as to the method of operation of the railroad.

Since the Act of 1875 is inapplicable, the cases construing the rights and duties arising under it are wholly immaterial. In the cases cited in appellee’s brief it was either stipulated or admitted by the pleadings that the Act applied.

B. At Common Law The Owner Of A Servient Estate Having A Right Of Entry To Repair Has A Duty To Third Persons To Exercise Such Rights. (Appellee’s Brief, pp. 10-13).

Assuming *arguendo* that the situation was a “bare easement,” as appellee alleges, the case of *Reed v. Allegheny Co.*, 330 Pa. 300, 199 Atl. 187—the only third party liability case cited—supports appellants. In that case, one injured as a result of a defect in a highway crossing of a railroad recovered against both the railroad and the county. The court reversed the verdict over in favor of the County against the railroad and remanded the action over for a new trial because there was no evidence to show any duty to maintain the crossing by

the railroad. *The plaintiff's verdict against both defendants was not disturbed.* The court said the duty to repair could be created (1) by statute, (2) by contract between the parties; and (3) by evidence of who "inspected the crossing and maintained it in repair over any long course of years."

In a subsequent decision, the Fifth Circuit has held that actual inspection and repair of a highway and railroad intersection by a railroad imposed liability upon it under Pennsylvania law, even though the right of way was actually owned by a separate but controlled corporation. *Conry v. Baltimore & O. R. Co.*, 209 F. (2d) 423 (CCA 3rd 1953).

In thus deciding the case upon the actual rights of the defendant in the property rather than upon any theoretical difference between the duties owed third parties under easements, leases, licenses or agency, the court was following the great weight of authority.

Hentz v. Toppin, 77 N. E. 2d 229, 322 Mass. 333 (1948) held the owner of a servient estate liable to a third person injured in using the easement as a result of faulty maintenance where the owner had merely reserved the right to repair.

This case is but an illustration of the rule that duties owed third persons with respect to the condition of premises depend upon the foreseeability of harm and the power of the defendant to obviate the danger.

"When the true basis for the liability of the lessor to persons outside the premises is understood, there can be no question but that the liability is the same whether the lessor covenants to repair or only reserves the right to enter to make repairs. The theory upon which a lessor is held liable in such cases is not that he is under any

affirmative contractual duty to such persons to make repairs, but that, by virtue of the covenant, the control of the premises continues in him. This power of control, being just as complete and efficacious where he only reserves a right of entry to make repairs as where he affirmatively covenants to repair, it is clear that, so far as the continuation of his liability is concerned, the nature of the covenant or agreement is immaterial." 89 A.L.R. 480, 484.

Appel v. Muller, 186 N.E. 785, 262 N. Y. 278 (Ct. App. 1933) held an owner liable upon the same theory of a duty to third persons outside the premises based upon the reservations of a power of control, saying at page 787:

"In this instance the lease contained no covenant by the landlord to make repairs for the tenant. It did contain a provision, however, reserving to the landlord 'the right to enter into and upon said premises, or any part thereof, and at all reasonable hours, for the purpose of examining the same, or making such repairs or alterations therein as may be necessary for the safety and preservation thereof.' As we have seen, the only force which a covenant to repair has in such a case arises from the implication that what the landlord has covenanted to do, he has reserved the power to do. In this case a resort to implication is unnecessary, for the power to enter and make necessary repairs was expressly reserved. The reservation, therefore, has accomplished, by express words, all that the covenant to repair might have done through implication. The landlord, therefore, had never parted so completely with possession and control that he had disabled himself from performing his duty of care towards

the travelers upon the street. He continued under the duty to keep his building in a safe condition; he reserved the power to perform this duty; therefore he was liable."

The same rule is applied to an owner of land who hires an independent contractor. *Boggess v. King County*, 150 Wash. 578, 274 Pac. 188 held the County liable to a child injured by dynamite caps left by an independent contractor in the road near the customary route taken by children going to school. Liability was not predicateed upon any theory of absolute liability, but simply upon the knowledge of the county that the caps were left in the county road. The court said (at p. 589):

"This fact the agent of the county knew, or should have known. As inspector of that work for the county, ordinary prudence dictated that he should direct the contractors to provide a safe place to store such explosives, or take them away from the work when not in use."

So here, ordinary prudence dictated that Ranger Floe should direct the railroad to abate the fire hazard on its right of way or do so himself as he had done before.

Secondly, appellee has wholly ignored the allegations of the complaint that the United States negligently failed to require the railroad to use a follow-up patrol to extinguish fires, although it had reserved the right to do so and he knew the railroad was not so operating. By no inference can this allegation be equated to a normal easement.

Spokane v. Fisher, 106 Wash. 378, 180 Pac. 139 held a landlord liable for the negligence of a tenant's employee in operating a sidewalk freight

elevator because the court could not find that the landlord

“ . . . *had no rights of supervision, duty to keep in repair, control over the operation, or financial benefit from the heating plant and the trap-door which was necessary for its maintenance and operation.*” (at p. 383, emphasis supplied).

The court held that the burden was on the landlord to establish non-liability for negligent operation by a tenant by showing a term lease “which wholly divests him of any and all control over the premises.” (p. 382).

See also, *Northern Pac. Ry. Co. v. Mentzer*, 214 Fed. 10 (CCA 9th 1914) where this court held one railroad responsible for the negligent operation of another over its tracks, without consideration of whether the trackage agreement constituted a lease, license or easement.

In *United States v. The Australian Star*, 172 F. (2d) 472 (CCA 2d 1949) *cert. denied*, 338 U. S. 823, 94 L. Ed. 499, 70 S. Ct. 69, the court held a United States vessel was under a duty to warn two other ships of danger and to take affirmative action to prevent a collision when it knew that the two vessels were on a collision course and had the power and means to order at least one of them to change course.

Appellee's statement that the United States had no financial interest in the operation of the railroad is similarly without foundation in the record. Such an interest is not a necessary condition of liability, but rather a factor bearing on the right to exercise control.

C. Appellee Had Reserved A Right To Enter Upon The Right-of-Way And Abate Combustibles And

Therefore Had All Of The Incidents Of Ownership Of An Owner, Operator Or Person In Possession Of The Right-of-Way." (Appellee's Brief, pp. 13-16).

Under Washington law, the owner of property subject to an easement who retains free and unrestricted access to the easement to keep it clear of combustibles or to require the easement holder to do so has both a common law and statutory duty to do so.

Washington statutes regulating fire hazards and establishing duties of fire fighting do not distinguish between owners of dominant and servient estates. The clear intent of such statutes is to prevent "*any person*" from doing any act that endangers the forests (R.C.W. 76.04.450, Rem. Rev. Stat., §5818). They require that "the owner, operator or person in possession of land" shall extinguish fires after notice of existence of a fire thereon (R.C.W. 76.04.380, Rev. of Rem. Rev. Stat., §5806, (1945)).

Appellee's assertion that appellee had only a reversionary interest in the land and a right to prevent the railroad from using the land for other than railroad purposes and its comparison of appellee to the holder of a right of entry for condition broken or a contingent or vested remainder is erroneous and contrary to the allegations of the complaint. Appellee had a right of access to the right of way and a right to remove combustibles from it in every sense equal to the power of the owner of unencumbered land. In addition, it had a right to require the railroad to abate the combustibles. Hence, appellee had all of the rights of an owner with respect to the accumulation of combustibles on the right of way, plus the right to compel another to abate the hazard and had actually exercised those rights in the past. (R. 8).

No reason in law or logic suggest itself why appellee having all of the incidents of ownership required to comply with the statute should escape from it because a third person subject to its control also had the same powers.

II. A. *This Court Has Decisively Disposed Of Appellee's Argument That Liability For Negligence May Not Be Predicated Upon Violation Of Criminal Statute.* (Appellee's Brief, pp. 16-18).

In *Spokane International Ry. Co. v. United States*, 72 F. (2d) 440, 442 (CCA 9th, 1934), a railroad was held civilly liable to the United States under a statute imposing criminal liability for failure to keep a right of way "clear and free of all combustible and inflammable material."

This court pointed out that "This criminal statute established a standard of care, failure in the observance of which would subject defendant to civil liability if such failure caused or contributed to the damage of another."

The court said such statutes "should not be construed to impose on defendant a standard of care impossible of fulfillment."

So here Appellant is not relying upon any theory of absolute liability based upon a criminal statute but upon negligence in observing the standard of care established by statute. The burden is upon appellee to show that the standard of care is impossible of fulfillment at the trial.

B. *The Rights, Duties And Liabilities As Between Appellee And The Railroad Are Immaterial In This Appeal* (Appellee's Brief, pp. 19-20).

Appellee again fails to cite any third party liability cases. Whether it be true or false that an adjoin-

ing landowner's recovery against the primary wrongdoer is defeated by his own negligence, it is irrelevant to the question of whether or not he is liable to third persons, where such negligence is a contributing cause of the spread of fire to lands of third persons.¹

C. The Complaint Clearly Alleges That Appellee's Violation Of The Statute In Causing An Accumulation Of Slashings Was A Proximate Cause Of The Damage. (Appellee's Brief pp. 21-22).

The complaint alleges in substance:

- (1) That the Forest Service had caused the accumulation of slashings in Section 31, (R. 15) which constituted a fire hazard in the Olympic Peninsula under the statute (R. 8-9).
- (2) That the fire spread into Section 31 (R. 13).
- (3) That as a proximate result of the negligence of the government in that respect, the property of the appellants was destroyed (R. 22).

Since these allegations must be construed in the most favorable light to the appellants and all doubts resolved in their favor, there is no question that they properly allege that the accumulation of slashings was at least a contributing cause to the spread of fire and appellants' damage.

III. A. *The Forest Service Acts In The Same Fashion*

¹That rule stated by appellee is not the law of Washington: *Stephens v. Mutual Lumber Co.*, 103 Wash. 1, 173 Pac. 1031 (leaving property unprotected with full knowledge of fire is contributory negligence barring recovery). See also *Nashville C. & St. L. Railroad v. Nants*, 65 S. W. (2d) 189, 167 Tenn 1, and *Woolworth Co. v. Seattle*, 104 Wash. 629, 177 Pac. 664, where violation of a statute by the adjoining landowner contributing to the damage barred his recovery. In this case, of course, the act of appellees in causing an accumulation of slash on its land constituted a violation of statute.

As The Owner Of Any Forest Lands And Was Not Fighting This Fire As A Public Fireman. (Appellee's Brief pp. 23-29).

At pages 23-29, appellee discusses the history and function of the Forest Service. It does not appear from the record or appellee's brief that these activities differ in any material respect from the conservation, timber development and fire protection practices of such large timber owners as Weyerhaeuser Timber Co., Crown-Zellerbach Co. or Rayonier, Incorporated.

Receipts of the Forest Service from its timber trading are not less impressive than the expenditure made by the Forest Service to protect the timber.²

Appellee again ignores the allegations of the complaint in arguing that the Forest Service was acting as a fire department. Paragraph XIII of the complaint (R. 10) alleges, in part:

"That in fact each of the several owners of extensive timber holdings in said area maintained fire fighting equipment as an incidental phase of its whole operation, and the defendant United States as one of said owners maintained less than an average amount of fire-fighting men and equipment."

B. The Tort Claims Act Contains No Exclusion For Negligence In The Performance Of A Public Function. (Appellee's Brief, p. 29-8).

Appellee here argues that the *Dalehite* case ex-

²U. S. Forest Service Reports show recent timber receipts to be the following:

<i>Fiscal Year</i>	<i>Timber Receipts</i>
1951	\$51,098,565.11
1952	63,722,985.58
1953	69,252,123.90

cepts from the Tort Claim Act negligence in the "performance of a public function." There is no such express exemption in the Act. The specific exemptions of liability for miscarriage of the mails, collection and assessment of taxes, fiscal operations of the Treasury and combatant activities of the military forces in time of war would be wholly unnecessary if the intent of the Act were to exclude "public functions" generally.

The Tort Claims Act is not the first waiver of government immunity. The Public Vessels Act of 1925, 43 Stat, 1112, 46 U. S. C. § 781 imposes the same liability upon the United States for the negligence of public vessels as is imposed by Admiralty Law upon private shipowners. It was passed for the same reasons as the Tort Claims Act—to obviate delay and the inconvenience to Congress in handling each claim by itself; and like the Tort Claims Act, its scope is not to be restricted by a narrow interpretation. *Canadian Aviator Ltd. v. United States*, 324 U. S. 215, 89 L. Ed 901, 65 S. Ct. 639 (1945). The Act contains no express or judicial exemption from liability for negligence in the performance of a "public function."³

Moran Towing & Transp. Co. v. United States, 80 F. Supp. 623, 631, 635 (S. D. N. Y. 1948) held the United States liable for negligent lookout and navigation of a naval vessel "engaged in a military mis-

³ In fact, it appears that the vessel must be engaged in the performance of a "public function" or else the libellant may be relegated to the Suits in Admiralty Act, *Rodriguez v. United States*, 204 F. (2d) 508 (CCA 3rd 1953). Under appellee's theory, proof of performance of a "public function" bars recovery under the waiver of immunity to common law torts whereas it is necessary to allege and prove that a United States vessel is engaged in a "public function" to recover under the waiver of immunity to admiralty torts.

sion" because a civilian vessel would have been so liable. The court refused to read any exception to liability into the act.⁴

This court has held the United States liable for negligence under the Public Vessels Act where the United States had both a public and private duty. In *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (CCA 9th 1945), the court held the United States liable for the loss of cocoa beans because of negligence in loading a navy lighter where it bore the relation of a carrier to the owner of the beans. The United States sought to escape liability by pointing out that the United States was simultaneously discharging a naval duty at the port which was under Japanese air attack at the time. The court disposed of the argument, saying:

" Here was outstanding negligence in the discharge of appellee's Naval duty to resist the enemy in discharging and in loading and ballasting the convoy and of the [its] carrier's duty to appellant. The performance of the Naval duty which is the claimed excuse for the loss of the cocoa beans is thus seen to be infected with negligence at the moment the carrier's obligation attached.⁵

The logical fallacy of appellee's argument that the *Dalehite* case and others established a "public function" exception is pointed out by its concession in

⁴ See also *United States v. The Australian Star*, 172 F. (2d) 472 (CCA 2d 1949) *cert. denied*, 338 U. S. 823, 94 L. Ed. 499, 70 S. Ct. 69, where an escorting naval vessel was held liable for negligence in failing to warn the escorted vessel and another that a collision between them was impending, although it knew of the danger and had the power and authority to prevent it. See also *The Sobreski*, 81 Lloyd's List L. R. 61.

⁵ Followed in *General Cocoa Co. v. United States*, 149 F. (2d) 815, (CCA 9th 1945).

footnote 29 that the Tort Claims Act would cover injuries caused by a Forest Service fire truck fighting a fire.

If anything is doctrinally sanctified in the law of torts, it is the immunity of communities and other public bodies for injuries due to the negligent operation of fire trucks.⁶

Either appellee's concession is the proverbial train ticket "good for this train and day only" or appellee has misinterpreted the *Dalehite* case. In arguing for a new exemption for "public functions" appellee is asking the courts to embark on a wholly uncharted course. Appellants agree with appellee that the governmental-proprietary distinction is not incorporated into the Tort Claims Act, but suggest that the appellee is in error in posing a new and wholly undefined exemption.

" The purpose of the Federal Tort Claims Act was to abrogate the immunity of the United States against suit in tort. Its purpose was to make the United States liable to suit in tort in the same manner as anyone else. Unlike other statutes waiving governmental immunity, the Federal Tort Claims Act should be *liberally construed* in order to effectuate the purpose that was intended by its framers. The words 'as a private individual' are not used as words of art or as a limitation, but, rather, in a descriptive manner to indicate that the United States should be liable in the same manner and to the same extent as anyone else." *Gilroy v. United States*, 112 F. Supp., 664, 665-666 (D.C.D.C. 1953) Quoted with approval in *O'Toole et al v. United States*, 206 F.

⁶ Paraphrasing the language of the *Dalehite* case upon which appellee relies.

(2d) 912, 918 (CCA 3rd 1953) (Emphasis supplied.)

C. The United States Is Liable To Appellants Under Its Fire Protection Agreement. (Appellee's Brief pp. 38-41.)

In disputing the appellants' position that the immunity of a sovereign state from liability in tort does not extend to an independent contractor doing work for the state, the Government dismisses the authorities advanced by appellants on the ground that they deal with construction work rather than fire protection work. Yet there are two cases contained in appellants' brief (at page 60): *Voltz v. Orange Volunteer Fire Association*, 118 Conn. 307, 172, Atl. 220 (Sup. Ct. 1934) and *Doherty v Oakland Beach Volunteer Fire Company*, 70 R. I. 446, 40 A. (2d) 737 (Sup. Ct. 1944) which do not lend themselves to such distinction. Appellants have found no cases holding otherwise, nor does *McQuillian on Municipal Corporations* in its section on this subject furnish any authority to the contrary.⁷

D. Appellee Cannot Avoid Private Duties By Alleging Negligence In The Performance Of A Public Duty. (Appellee's Brief, pp. 42-45.)

Appellee again fails to meet the issue of the liability of a private landowner in Washington. Nothing is clearer than the duty of a landowner in Washington to fight a fire on his lands, however it originates. It is both a common law and statutory duty.⁸

It is appellants' position that the Forest Service had no duty as a public fire department, but was

⁷ See *McQuillian on Municipal Corporations*, page 371, §53.82.

⁸ See cases and statutes cited at pp. 36-39 and 55-57 of Appellants' Brief.

at all times performing the duties of any private landowner. Even assuming, however, that the Forest Service was also a fire department, it would have, with respect to its own lands at least, a dual duty. Negligence in the performance of the public duty would not exculpate it from liability for negligence in the performance of the private duty. *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (CCA 9th 1945). *Hillstrom v. City of St. Paul*, 134 Minn. 451, 159 N. W. 1076 (1916).

In arguing that the United States as a landowner has fulfilled its private duty by maintenance of a public fire department, appellee implies that the United States had no one charged with performance of the former duty. A private landowner who fails to take steps in fighting a fire on his own lands, although he had the means to do so, would be liable to third persons damaged by the escape of the fire, notwithstanding any negligence of the public bodies that might also have occurred. It is not due care for a Washington timber owner to rely exclusively upon a public fire department. *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 and *Wood & Iverson, Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712.

While appellee appears to regard these cases as inapplicable, in both the court held the landowner liable for the negligence of a public official performing a duty for the landowner which was also an official and public duty. Regardless of any fiction as to what "capacity" the state fire warden acted in the *Galbraith* case, he was performing a duty owed by a landowner at the request of the landowner. The particular act of burning slash was also a public duty which the law required be performed in his official capacity. In the *Wood & Iverson* case,

the particular negligence of the fire wardens in starting a fire to burn slashings was a failure to require the cutting of snags — a duty the court held was mandatory “upon the Forestry Department and upon the owner or possessor of lands.” In these two cases, the Washington courts expressly held that the landowner was liable for negligent acts of public firemen. So, here, District Ranger Fleece was performing a duty of the United States as a landowner in fighting a fire occurring on its land, at its request and cost. Whether or not, at other time and places, he might wear a public fireman’s hat, he was then performing a non-delegable private duty of the United States. The United States is liable for his negligent acts and omissions.

It appears from the complaint that the initial fire occurred on the government owned and controlled right of way. It is alleged that appellee was negligent in permitting it to escape to a larger area. In this second stage, the fire was exclusively on United States land and it is alleged that it could and should have been extinguished at that point; but it was negligently permitted to escape again. Finally, it is alleged that the fire was again controlled by appellee, could and should have been extinguished but was allowed to smoulder for 40 days and escape again.

Since a landowner is under a duty to fight a fire occurring on his own lands and is required to pursue it if necessary, regardless of how it originates, appellee does not suggest that this is any reason for distinguishing between a fire that burns off an easement and onto unencumbered land but was at all times capable of being extinguished and a fire that is ignited directly upon the unencumbered land. In this case, appellee’s argument would lack even su-

perforated substance if the spark from the railroad had landed just outside the easement instead of between the rails.

The duties of timber owners to protect the wealth of the state does not depend upon any such vagary of wind or width of right of way.

Finally, appellee concludes by reverting to its initial error that appellee was only a helpless owner of "a reversionary interest" in the right of way, contrary to fact and the allegations of the complaint.

CONCLUSION

This is an appeal from a judgment granting appellee's motion for judgment on the pleadings. The allegations of the complaint are deemed fully established and are to be construed and doubts resolved in favor of appellants. Appellee's brief starts with an erroneous assumption that appellee was a servient owner of land subject to an easement granted by statute and cites cases construing the statute. Neither the statute nor the cases are relevant to the facts or the pleadings.

Appellee next announces a rule of law and cites cases governing the burden of repair to an easement as between dominant and servient owners. Neither the rule of law nor the cases are relevant to the facts or the pleadings.

Continuing with doctrine and cases removed from the issues, appellee cites cases to the effect that a landowner is not barred by contributory negligence from recovering damage occasioned by his neighbor's negligent use of land—applicable perhaps to appellee's cross-complaint against the railroad, but not relevant in the matter before the court.

At the same time appellee has ignored the allegations of the complaint showing it had a right to control the operation of the railroad as well as the right to control the condition of the premises, and has also ignored cases declaring the liability of private persons and municipal corporations to third persons in like circumstances.

The appellee would compound confusion by adding to the Tort Claims Act a new exception entitled "public function"—an exception without basis in logic or precedent. This new exception is its only answer to the distinctions pointed out between the

case at bar and the Dalehite case upon which the District Court relied and the many cases holding municipal corporations liable for negligence in permitting fire to escape from their own lands. It is a theory borne of necessity. It ignores the allegations of the complaint that appellee, like other adjacent timber owners, maintains fire-fighting equipment "as an incidental phase of its whole operation." (R. 10).

Appellee is not entitled to avoid a trial upon the allegations of the complaint by any argument that erroneously assumes facts and rules of law inapplicable to the action. If appellants' authorities would not justify a trial against a similarly situated private timber owner, appellee could have met them without resorting to unjustified assumptions and inapplicable cases.

No doctrine of public policy, or fear of extending the Tort Claims Act to new or novel causes of action justifies frustrating the purpose of that Act by refusing to apply to the United States the well-defined and long-standing duties that govern owners of Washington timber-land.

It is respectfully submitted that the judgment of the District Court should be reversed.

Respectfully submitted,

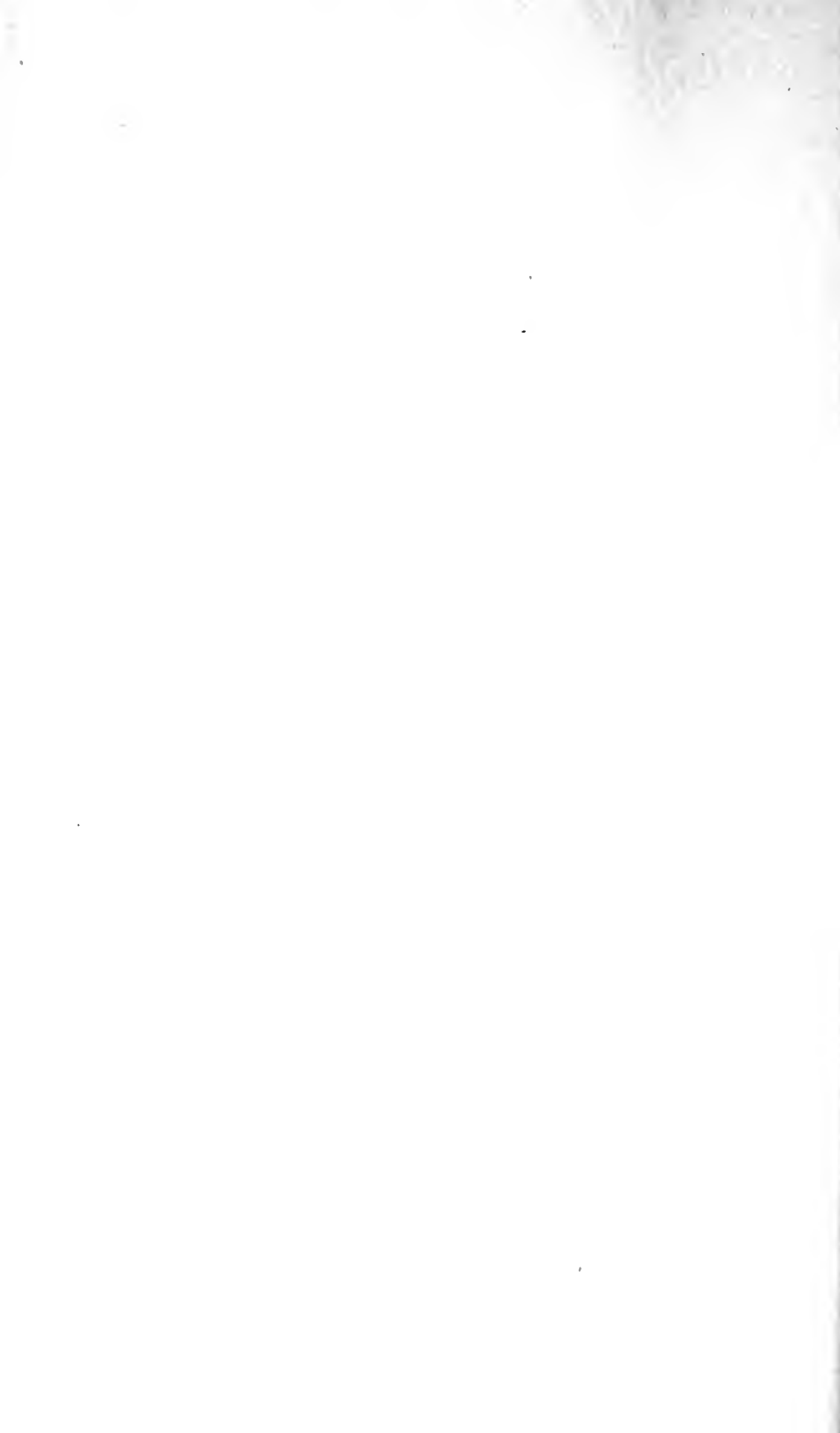
FERGUSON & BURDELL

Wm. H. Ferguson

W. Wesselhoeft

Donald McL. Davidson

Attorneys for Appellants



No. 14331

**In the United States Court of Appeals
for the Ninth Circuit**

ARTHUR A. ARNHOLD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION**

BRIEF FOR APPELLEE

WARREN E. BURGER,
Assistant Attorney General,
CHARLES P. MORIARITY,
United States Attorney,
FRANCIS N. CUSHMAN,
Assistant United States Attorney,
SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
SONDRA KAPLAN,
Attorneys, Department of Justice.

FILED

OCT 1 1954

PAUL P. O'BRIEN
CLERK

INDEX

	Page
Jurisdictional statement	1
Statement of the case	2
Argument	5
Introductory statement	5
I. Neither Statutory Nor Common Law Liability Can Be Imposed Upon The United States By Reason Of The Alleged Combustible Matter On The Railroad's Right of Way.....	7
A. The Port Angeles Western Railroad's Right of Way Through The Olympic National Forest Is An Easement Through Public Lands....	8
B. At Common Law The Responsibility For Maintenance of an Easement Rests Solely Upon the Owner of the Dominant Estate....	10
C. The Owner of the Servient Estate Is Under No Statutory Duty in Washington to Keep an Easement Free of Combustible Matter....	13
II. The Allegations In The Complaint Respecting The Pres- ence Of Combustible Matter On Lands Adjoining the Right Of Way Do Not State A Cause Of Action Under The Tort Claims Act	16
A. The Washington Statutes Relied Upon By Appellants Cannot Serve as the Basis for a Claim Under the Act.....	16
B. An Adjoining Landowner Is Under No Com- mon Law Duty to Guard Against the Negli- gent Act of a Railroad On Its Right of Way	19
C. The Allegations of Fact Do Not Indicate a Causal Relationship Between the Presence of The Combustible Matter And The Damage Complained Of	21
III. Liability May Not Be Imposed Upon The United States Under The Tort Claims Act For The Asserted Negligence Of The Forest Service In Fighting The Fire	22
A. The Actions of the Forest Service Personnel in Fighting This Forest Fire on Public and Private Land Were Those of Public Fire- men	23
B. The Tort Claims Act Does Not Extend To Claims Grounded Upon The Assertedly Negligent Performance Of A Public Func- tion	29
C. The United States Owed No Actionable Duty to Appellants Under Its Fire Protection Agreement With The State of Washington	38

Argument—Continued

	Page
D. The United States Breached No Duty Ow- These Appellants by Reason Of Its Owner- ship Of The National Forest.	42
Conclusion	46
Appendix	47

CITATIONS

Cases:

<i>Abrams v. Seattle & M.R. Co.</i> , 27 Wash. 507, 68 Pac. 78.....	11
<i>Arneil v. Schnitzer</i> , 173 Ore. 179, 144 P. 2d 707.....	20
<i>Atlas Assurance Co. Ltd. v. State</i> , 102 Cal. App. 2d 789, 229 P. 2d 13	20
<i>Avey v. West Palm Beach</i> , 152 Fla. 717, 12 So. 2d 881.....	35
<i>Bellevue, City of v. Daly</i> , 14 Idaho 545, 94 Pac. 1036.....	10
<i>Bina v. Bina</i> , 213 Iowa 432, 239 N.W. 68.....	14
<i>Bowers v. East Tennessee & W. N. C. R. Co.</i> , 144 N.C. 684, 57 S.E. 453	19
<i>Brogan v. City of Philadelphia</i> , 346 Pa. 208, 29 A. 2d 671.....	35
<i>Burr v. Clark</i> , 30 Wash. (2d) 149, 190 P. (2d) 769.....	21
<i>Cunningham v. City of Seattle</i> , 40 Wash. 59, 82 Pac. 143.....	39
<i>Dalehite v. United States</i> , 346 U.S. 15, 5, 17, 23, 30, 31, 32, 35, 36, 38, 39, 42, 43	
<i>Dempsey v. New York Central & Hudson River R. Co.</i> , 146 N.Y. 290, 40 N.E. 867.....	30
<i>Dorminey v. Montgomery</i> , 232 Ala. 47, 166 So. 689.....	35
<i>Feres v. United States</i> , 340 U.S. 135..... 32, 34, 35, 36	
<i>Fireman's Fund Ins. Co. v. Northern Pacific R. Co.</i> , 46 Wash. 635, 91 Pac. 13	11
<i>Galbraith v. Wheeler-Osgood Co.</i> , 123 Wash. 229, 212 Pac. 174.	44
<i>Glanzer v. Shepard</i> , 233 N.Y. 236, 135 N. E. 275.....	41
<i>Great Northern Ry. Co. v. United States</i> , 315 U.S. 262.....	9, 12
<i>Hagerman v. City of Seattle</i> , 189 Wash. 694, 66 P. 2d 1152....	40
<i>Harris v. United States</i> , 205 F. 2d 765 (C.A. 10).....	18
<i>Hastings v. Chi., R. I. & P. Ry. Co.</i> , 148 Iowa 390, 126 N.W. 787	10
<i>Heale v. United States</i> , 207 F. 2d 414 (C.A. 3).....	18
<i>Herman v. Roberts</i> , 119 N.Y. 37, 23 N.E. 442.....	10, 14
<i>Herzog v. Grosso</i> , 41 Cal. 2d 219, 259 P. 2d 429.....	10
<i>Himonas v. Denver & R. G. W. R. Co.</i> , 179 F. 2d 171 (C.A. 9).	9
<i>Indian Towing Company v. United States</i> , 211 F. 2d 886 (C.A. 5)	36, 38
<i>Jordan v. Spokane P. & S. Ry. Co.</i> , 109 Wash. 476, 186 Pac. 875	44, 45
<i>Kleinclaus v. Marin Realty Co.</i> , 94 Cal. App. 2d 733, 211 P. 2d 582	20
<i>Labor Board v. Jones & Laughlin Co.</i> , 331 U.S. 416.....	30
<i>Lawson v. City of Seattle</i> , 6 Wash. 184, 33 Pac. 347.....	40
<i>Leroy Fibre Co. v. Chi., Mil. & St. P. Ry.</i> , 232 U.S. 340.....	19
<i>Lynch v. North Yakima</i> , 37 Wash. 657, 80 Pac. 79.....	39, 40
<i>McKain v. B. & O. R. Co.</i> , 65 W. Va. 233, 64 S.E. 18	44
<i>Miralago Corp. v. Village of Kenilworth</i> , 290 Ill. App. 230, 7 N.E. 2d 602.....	35

Cases—Continued

	Page
<i>Moch v. Rensselaer Water Co.</i> , 247 N.Y. 160, 159 N.E. 896 . . .	40
<i>Moffett v. Berlin Water Co.</i> , 81 N.H. 79, 121 Atl. 22	14
<i>National Manufacturing Co. v. United States</i> , 210 F. 2d 263 (C.A. 8), certiorari denied, 347 U.S. 967	5, 36, 38
<i>Neallus v. Hutchinson Amusement Co.</i> , 126 Me. 469, 139 Atl. 671	30
<i>New York C. & St. N. R. Co. v. Fieback</i> , 87 Ohio St. 254, 100 N.E. 889	30
<i>Prince v. Chehalis Savings & Loan Association</i> , 186 Wash. 372, 58 P. 2d 290, affirmed on rehearing, 186 Wash. 377, 61 P. 2d 1374	20
<i>Rayonier v. United States</i> , (No. 14329, C.A. 9)	2
<i>Reed v. Allegheny Co.</i> , 330 Pa. 300, 199 Atl. 187	10, 11
<i>Sandberg v. Cavanaugh Timber Co.</i> , 95 Wash. 556, 164 Pac. 200	44
<i>Savage v. District of Columbia</i> , 52 A. 2d 120 (Mun. App. D.C.)	35
<i>Schatter v. Bergen</i> , 185 Wash. 375, 55 P. 2d 344	22
<i>Slaton v. Chi., M. & St. P. R.R.</i> , 97 Wash. 441, 166 Pac. 644 . . .	11
<i>Small v. Board of Council of City of Frankfort</i> , 203 Ky. 188, 261 S. W. 1111	35
<i>State v. Furth</i> , 82 Wash. 665, 144 Pac. 907	15
<i>State v. Levy</i> , 8 Wash. 2d 630, 113 P. 2d 306	15
<i>Steitz v. City of Beacon</i> , 295 N.Y. 51, 64 N.E. 2d 704	35
<i>Strauss v. Thompson</i> , 175 Kan. 98, 259 P. 2d 145	10
<i>Texas City Disaster Litigation, In re</i> , 197 F. 2d 771 (C.A. 5), affirmed sub nom. <i>Dalehite v. United States</i> , 346 U.S. 15 . . .	33, 35
<i>Thornton v. Missouri Pacific R. Co.</i> , 42 Mo. App. 58	30
<i>United States v. Inmon</i> , 205 F. 2d 681 (C.A. 5)	18
<i>United States v. Spelar</i> , 338 U.S. 217	30
<i>Walters v. Mason County Logging Co.</i> , 139 Wash. 265, 246 Pac. 749	44
<i>Wilcox v. City of Chicago</i> , 107 Ill. 334	35
<i>Wolten Grocery Co. v. Puget Sound Bridge & Dredging Co.</i> , 165 Wash. 27, 4 P. 2d 863	42
<i>Wood & Iverson Inc. v. Northwest Lumber Co.</i> , 138 Wash. 203, 244 Pac. 712	44

Statutes:

Act of March 3, 1891, c. 561, § 24, 26 Stat. 1103, as amended, 16 U.S.C. 471	24
Act of June 4, 1897, as amended, 30 Stat. 35, 16 U.S.C. 476 . . .	24, 26
Act of February 1, 1905, c. 288, 33 Stat. 628	25
Act of March 3, 1905, 33 Stat. 872	25
Act of May 23, 1908, c. 792, 35 Stat. 259, 260, as amended, 16 U.S.C. 500, 553	27
Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U.S.C. 563: Sec. 2	27
Act of March 4, 1913, 37 Stat. 843, 16 U.S.C. 501	27
Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U.S.C. 564	28
Federal Tort Claims Act (Title IV of the Legislative Reorgani-	

Statutes—Continued

	Page
zation Act of 1946), 60 Stat. 842, as reenacted 62 Stat. 869, 992:	
28 U.S.C. 1346	1
28 U.S.C. 1346(b)	17, 31, 47
28 U.S.C. 2674	31, 32, 35, 37, 38, 47
28 U.S.C. 2680(a)	31, 37
Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U.S.C. 934	8
Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 35..	24
Rev. Code Wash.:	
Sec. 4.24.040 (R.R.S. 5647)	48
“ 76.04.060	29
“ 76.04.070	29
“ 76.04.370 (R.R.S. 5807)	13, 14, 16, 17, 48
“ 76.04.450 (R.R.S. 5818)	13, 16, 49
“ 76.04.480 (R.R.S. 5821)	14
Miscellaneous:	
2 American Law of Property, § 866	10
18 A.L.R. 2nd 1081	45
“ “ “ “ 1089	45
“ “ “ “ 1090	12
“ “ “ “ 1091	45
“ “ “ “ 1097	45
42 A.L.R. 783	45
“ “ “ “ 795	45
“ “ “ “ 799	12
“ “ “ “ 812	45
“ “ “ “ 821	45
Annual Report of the Secretary of Agriculture (1951) p. 18...	28
Annual Report of the Secretary of Agriculture (1952) p. 18..	25
Budget of the United States for the fiscal year ending June 30, 1954:	
p. 402	29
p. 403	29
p. 406	29
Budget of the United States for the fiscal year ending June 30, 1955:	
p. 338	29
p. 339	29
p. 343	28, 29
43 C.F.R. (1949 ed.) 243.2	10
67 Cong. Rec. 11086-11100	30, 31
67 Cong. Rec. 11092	30
69 Cong. Rec. 2191	31
“ “ “ 2192	30

Miscellaneous—Continued

	Page
“ “ “ 2196	31
“ “ “ 3117	31
“ “ “ 3118	30
“ “ “ 3127	31
86 Cong. Rec. 12021-12022	31
Green, <i>Rationale of Proximate Cause</i> (1927):	
p. 3	22
p. 4	22
Guthrie, Great Forest Fires of America (U.S. Department of Agriculture, 1936), p. 6	27
Hearings before a Subcommittee of the House Committee on Claims, 72nd Cong., 1st Sess. (Feb. 1932), p. 17	30
Hearings on H. R. 7236, 76th Cong., 3rd Sess. (April 1940), p. 16	30
Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2nd Sess. (Jan. 29, 1942):	
p. 28	30, 31
p. 33	31
p. 37	30
p. 38	31
p. 39	30
p. 45	31
p. 65	31
p. 66	30, 31
Hearings on S. 2690, 76th Cong., 3rd Sess. (March 1940), pp. 27-28	30
H. R. 7236, 76th Cong. (86 Cong. Rec. 12021)	31
H. Rept. No. 2800, 71st Cong., p. 9	31
H. Rept. No. 2428, 76th Cong., p. 3	30
H. Rept. No. 2245, 77th Cong., p. 10	30, 31
H. Rept. No. 1287, 79th Cong., p. 5	30, 31
<i>Highlights in Forest Conservation</i> (U.S. Department of Agri- culture Information Bulletin No. 83 (1952)), p. 9	27
<i>Jones on Easements</i> (1898) § 831	11, 14
12 L. R. A. (N.S.) 624	19
Note, 23 L. R. A. (N.S.) 289	44
<i>Our National Forests</i> (U.S. Department of Agriculture In- formation Bulletin No. 49, (1951)):	
p. 2	25
p. 3	25
p. 4	25
p. 26	26
Prosser on Torts:	
p. 177	22
pp. 311 <i>et seq.</i>	22

Miscellaneous—Continued

	Page
S. Rept. No. 1196, 77th Cong., p. 7	31
S. Rept. No. 1400, 79th Cong., p. 31	30
Sparhawk, <i>The History of Forestry in America</i> , The Yearbook of Agriculture (U.S. Department of Agriculture, 1949) :	
p. 702	24
p. 706	24
p. 709	25
<i>The Work of the United States Forest Service</i> , (U.S. Depart- ment of Agriculture Information Bulletin No. 91 (1952)) :	
pp. 5-20	26
p. 12	28
p. 18	28

**In the United States Court of Appeals
for the Ninth Circuit**

No. 14331

ARTHUR A. ARNHOLD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, NORTH-
ERN DIVISION*

BRIEF FOR APPELLEE

JURISDICTIONAL STATEMENT

Appellants brought this action against the United States under the provisions of the Federal Tort Claims Act¹ in the United States District Court for the Western District of Washington, Northern Division (R. 3-63). On March 1, 1954 an order dismissing the complaint with prejudice was entered in favor of the United States (R. 80-81). On March 31, 1954, notice

¹ The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2402, 2411, 2412, 2671-2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

of appeal was filed (R. 82). The jurisdiction of this Court rests upon 28 U. S. C. 1291 and 1294(1).

STATEMENT OF THE CASE

In this action, appellants seek to recover damages against the United States, the Port Angeles Western Railroad, the Railroad's trustee in reorganization and Fibreboard Products Incorporated, a Delaware corporation, for property loss allegedly sustained as a result of a forest fire in Clallam County, Washington (R. 4-63). The appeal is from a judgment dismissing the complaint as to the United States (R. 80-81).²

Summary of the allegations of fact in the fourth amended complaint. The Port Angeles Western Railroad maintains a right of way through the Olympic National Forest west of Crescent Lake in Clallam County, Washington (R. 6). On and prior to August 6, 1951, large quantities of dry grass and other combustible herbiage were present on the right of way; many of the trees in the roadbed were old and rotted; and discarded rotted trees, slash, and other inflammable material lay in close proximity to the roadbed (R. 6). This was known to the officers of the Railroad (R. 6). It was also known to employees of the Forest Service of the U. S. Department of Agriculture who failed to require the Railroad to abate these hazardous conditions although the United States reserved the right to do so and had on prior occasions exercised that right (R. 8). Additionally, slashings had accumulated upon

² This case involves the same series of events and presents basically the same claim as *Rayonier v. United States* which also is now pending on appeal in this Court (14329). While the Government's position is virtually identical in both cases, our briefs differ in some respects; e.g., in the footnote material here we consider the contentions peculiar to these appellants.

portions of the national forest upon which the United States, through the Forest Service, bought, sold and traded timber for a profit (R. 8, 9).

On or about about noon on August 6, 1952, a Port Angeles Western Railroad steam powered locomotive proceeding in an easterly direction along the right of way threw sparks and fire into the dry grass, combustible herbiage, and rotten trees in and near the tracks, igniting this material in at least six places (R. 6). The locomotive was not afforded a follow-up patrol nor was fire fighting equipment stationed by the railroad along the right of way (R. 7). Further, after the fires broke out the Railroad made no effort to extinguish them although the crew of the train could have easily done so (R. 7). The United States knew or should have known that the railroad was not regularly employing a follow-up patrol but, although it had reserved the right to do so, it did not require such a patrol on August 6, 1951 (R. 8).

The State of Washington and the United States had entered into an agreement whereby the latter was to furnish fire protection in the area of the Olympic Peninsula by assuming the duties and privileges of state fire wardens, including the right to conscript and impress men and equipment for fire suppression (R. 10). Upon receipt of a report of the outbreak of one of the fires in the railroad roadbed, District Ranger Floe of the Forest Service dispatched men to control it (R. 11). These men were insufficient in number and took insufficient equipment with them (R. 11). Sufficient men and equipment were available on two hours notice (R. 11).

It is further alleged that, on the morning of August 7, 1951, Floe dispatched further men and equipment

which arrived on the scene of the fire at 7:00 A.M. (R. 12). They could and should have been summoned so as to have commenced fire fighting operations at 4:00 A.M. when daylight first appeared (R. 12). Moreover, Floe did not call upon the amount of available men and equipment called for by the Fire Suppression Plan which was in effect at that time and which had been approved by the Regional Supervisor of the Forest Service (R. 12).

On the afternoon of August 7, an ordinary breeze caused the fire to cross inadequately constructed and undermanned and equipped fire lines and to escape onto a 1600 acre area which included lands owned by Fibreboard Products (R. 13). Floe, and the men working under his direction, brought the fire under control on or about August 10, 1951, but neither Floe nor Fibreboard took sufficient precautions and adequate action in respect to containing and extinguishing it within the 1600 acre area (R. 13-15).

Early on the morning of September 20, 1951, a northeast wind of not unusual force fanned smouldering fires on Fibreboard's land with the consequence that the fires spread rapidly in a southwest direction (R. 15, 19). During the following twenty-four hours, property owned or insured by appellants was damaged or destroyed (R. 15).

Proceedings in the court below. On February 19, 1954, on which date appellants' third amended complaint was still outstanding, the United States filed a motion for judgment on the pleadings on the grounds that the complaint failed to state a cause of action and that the District Court lacked jurisdiction over the subject matter of the action (R. 79-80). On February

27, 1954, the fourth amended complaint was filed (R. 63). On the same date, the Government's motion came on for hearing and, by stipulation, it was directed to the fourth amended complaint (R. 86, 89). After argument, the District Court granted the motion on the ground that the complaint did not state a cause of action under the Federal Tort Claims Act and, on March 1, 1954, an order was entered dismissing the cause with prejudice (R. 80-81). In his oral remarks from the bench, Judge Boldt cited *Dalehite v. United States*, 346 U. S. 15 and *National Manufacturing Co. v. United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (R. 92-93).

ARGUMENT

Introductory Statement

The court below has held that appellants' complaint fails to state a claim upon which relief may be granted under the Tort Claims Act. That holding is correct in every respect. As will be demonstrated, neither the Act itself nor, insofar as it is applicable, the law of the State of Washington permits the imposition of liability upon the United States by reason of the asserted act and omissions of employees of the Forest Service which form the basis of the instant claim.

In Point I below, we discuss the allegations of the complaint in respect to the purported failure of the United States to compel the Port Angeles Western Railroad to remove combustible matter from its right of way and to observe certain safety practices. For the purposes of this discussion, we can assume *arguendo* that appellants are right in suggesting that the United States, as the owner of the Olympic National

Forest, may be analogized to the owner of private property and that the provisions of Washington statutes may be deemed to govern the administration of federally owned public lands. For, as will be shown, neither under these statutes nor under the common law would a private landowner be responsible for the condition or manner of use of a railroad right of way running across his property. Furthermore, the fact that the United States may have reserved the privilege of requiring the Railroad to maintain its right of way in a safe condition and to conduct its operations on that right of way in a safe manner hardly implies the existence of legal duty to do so.

In Point II we turn to the allegations in the complaint in respect to the presence of combustible matter on national forest land adjoining the right of way. We show in this connection that the Washington statute relied upon by appellants, which imposes absolute liability upon a landowner for the mere presence of such matter on his property whether he is responsible for its existence or not, may not serve as the basis for a claim under the Tort Claims Act. Additionally, it will be shown that the common law imposes no duty under which a property owner would be civilly liable solely by reason of the presence of combustibles on his land in circumstances where the fire causing the damage did not originate on that property, or where the damage to third persons was not proximately caused by the combustibles. In this regard, it is to be noted that the complaint here does not contain the specific allegation that the inflammable matter on the national forest was the result of activities undertaken by the United States. Nor do the allegations of fact indicate that the proxi-

mate cause of the injury to appellants' property was the purported presence of combustibles on the national forest.

In Point III will be considered the allegations concerning developments subsequent to the outbreak of the forest fire on August 6, 1951. We shall demonstrate that the fire suppression activities were undertaken by employees of the Forest Service in their capacity as public firemen and that, as a consequence, their asserted negligence in the performance of these activities does not give rise to liability under the Tort Claims Act. Insofar as the agreement between the United States and the State of Washington calling for fire protection in the Olympic Peninsula area is concerned, that agreement merely emphasizes the public nature of the fire fighting endeavors of the Forest Service and, in any event, does not create an actionable duty upon the part of the United States running to these appellants. Finally, the Washington statutes and judicial decisions relied upon by appellants, even if they may be considered applicable, do not support the theory that the United States as owner of the national forest breached a duty owing appellants by reason of the asserted negligence of the Forest Service in fighting the fire.

I

Neither Statutory Nor Common Law Liability Can Be Imposed Upon the United States by Reason of the Alleged Combustible Matter on the Railroad's Right of Way.

It is not disputed that the forest fire occasioning the damage complained of was caused by the ignition of combustible material on the right of way maintained by the Port Angeles Western Railroad across the

Olympic National Forest. It is also unchallenged that the ignition resulted from a spark from a steam locomotive owned and operated by the Railroad. Appellants urge, however, that by reason of its ownership of the national forest, the United States was charged with the responsibility of keeping the railroad right of way clear of combustible matter. From this, appellants proceed to the conclusion that by failing to abate the fire hazard which the Railroad created and continued in violation of both the common law and Washington statutes, the Government itself became answerable under the Tort Claims Act for the consequences of any fire resulting from the Railroad's negligent operations on the right of way.

The difficulty with this line of reasoning lies in the invalidity of the premise that the United States owed a duty to these appellants in respect to the right of way. This in turn stems from a total misconception of the nature of the Railroad's interest in the right of way and the legal duties concomitant with that interest.

A. The Port Angeles Western Railroad's Right of Way Through The Olympic National Forest Is An Easement Through Public Lands.

The right of way possessed by the Port Angeles Western Railroad across the Olympic National Forest, in common with other rights of ways held by railroads on the public domain, was granted by the United States pursuant to the Right of Way Act of March 3, 1875, 18 Stat. 482, 43 U. S. C. 934. This statute, which patently was designed to aid in the expansion of railroad and telegraph facilities, provides as follows:

The right of way through the public land of the United States is granted to any railroad company

duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

The question of the extent of the railroad's interest in a right of way granted under the Act has been considered by the Supreme Court on several occasions, most recently in *Great Northern Ry. Co. v. United States*, 315 U. S. 262. In the *Great Northern* case the Court, after a reference to the legislative history of the Act, its early administrative interpretation and the construction placed upon it by Congress in subsequent enactments, held unequivocally that railroads enjoy an easement in their rights of way on public lands. This holding was followed by this Court in *Himonas v. Denver & R. G. W. R. Co.*, 179 F. 2d 171.

The present administrative construction of the character of the grant fully accords with the judicial view. The regulations of the Department of Interior pertaining to rights of way advise railroads that while they do

not possess a full and complete title to the land over which the right of way is located, they do enjoy the right to use the land for the purposes for which the grant was made and may hold possession for as long as that use continues. The regulations give further assurance that, if the Government conveys the fee simple title, the patentee will take subject to the railroad's right of use and possession. And persons settling on a tract of public land also take subject to any existing right of way. See 43 C. F. R. (1949 ed.) 243.2.

B. At Common Law the Responsibility For Maintenance of an Easement Rests Solely Upon the Owner of the Dominant Estate.

1. Since the Port Angeles Western Railroad was the possessor of an easement as to the land upon which it maintained its right of way, the United States was under no common law obligation to maintain, repair, or otherwise keep it in good condition. It is too well settled to be open to question here that, in the absence of a contract specifying the duties and obligations of the dominant and servient owners with respect to the easement, the holder of the servient estate owes no obligation either to the dominant owner or to third parties to make repairs. Instead, the duty devolves upon, and solely upon, the owner of the easement to maintain the dominant estate and to insure that it remains in good condition. See *e.g.* *Reed v. Allegheny Co.*, 330 Pa. 300, 303, 199 Atl. 187; *Herzog v. Grosso*, 41 Cal. 2d 219, 259 P. 2d 429; *Strauss v. Thompson*, 175 Kan. 98, 259 P. 2d 145; *City of Bellevue v. Daly*, 14 Idaho 545, 549, 94 Pac. 1036; *Hastings v. Chi. R. I. & P. Ry. Co.*, 148 Iowa 390, 126 N. W. 787; *Herman v. Roberts*, 119

N. Y. 37, 23 N. E. 442. See also 2 *American Law of Property*, § 866; *Jones on Easements* (1898) § 831.³

Thus, if there is substance to the allegations in appellants' complaint regarding the condition of the right of way, it is the Railroad alone that has breached a common law duty. To maintain a right of way in proper condition is, among other things, to keep it free of unnecessary fire hazards. And where the Railroad fails to do so, and a fire is started thereon by sparks from one of its locomotives, Washington law makes it unmistakably clear that it is liable for any damage occurring to adjoining property. This is true even if there is no negligence in equipping and operating the engine. See *e.g. Abrams v. Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78; *Fireman's Fund Ins. Co. v. Northern Pacific R. Co.*, 46 Wash. 635, 91 Pac. 13; *Slaton v. C. M. & St. P. R. R.*, 97 Wash. 441, 166 Pac. 644.⁴

2. That the United States may have, in its grant to the Railroad, reserved the *right* to enter upon the premises, or to require the Railroad to remove combustibles from the right of way, does not affect the applicability of these principles. As the complaint tacitly concedes, the reservation did not contain an agreement by the Government to assume the Railroad's responsibility as holder of the easement to abate fire hazards and generally keep the property in good order. And, as noted above, such an agreement is an absolute condition precedent to imposing common law liability upon the ser-

³ As the Pennsylvania Supreme Court put it in the *Reed* case [330 Pa. at 303]:

Ordinarily [i.e., in the absence of contract] the owner of a servient estate is under no obligation to make repairs; the duty is upon the one who enjoys the easement to keep it in proper condition, and if he fails to do so and injury to third persons results, he alone is liable. [Emphasis supplied]

⁴ See next page

vient rather than the dominant owner for injury resulting from faulty maintenance of an easement.

The motivation behind the reservation of a right of entry is not difficult to envisage. The easement having been granted for the limited purpose of use as a railroad right of way, the Government must be in a position to make certain that no other and unauthorized use is being made of it. Cf. *Great Northern R. Co. v. United States*, *supra*.⁵ Additionally, because the failure of the Railroad to take adequate safety precautions in the operation of its trains and the maintenance of the right of way affects or endangers in the first instance the adjoining forest lands owned by the United States, the Government understandably desires, for its own benefit, the opportunity to ascertain the manner in which the Railroad conducts its affairs on its easement.

The short of the matter is therefore that the right of entry, admittedly not coupled with an agreement to abate fire hazards or even an agreement to assume a duty of inspection of the right of way, is simply for the protection of the Government. As such, appellants cannot claim the benefit of it; nor does it disturb the force of the normal rule that third persons must look to the owner of the dominant estate if the condition or use of the estate causes harm to them.*

⁴ The Washington rule is of course not unique. The failure to keep its right of way clear from combustible matter will in virtually every jurisdiction impose liability upon the railroad if the combustibles are ignited by sparks from a locomotive. See cases cited 18 A.L.R. 2d 1090 *et seq.*, 42 A.L.R. 799 *et seq.* We know of no occasion where in similar circumstances liability was additionally imposed upon the possessor of the servient estate, *i.e.* the owner of the land across which the right of way is maintained.

⁵ In the *Great Northern* case, the United States sought to enjoin the railroad from drilling or removing oil, gas or minerals under-

C. The Owner of the Servient Estate Is Under No Statutory Duty in Washington to Keep an Easement Free of Combustible Matter.

Because the railroad right of way crosses the Olympic National Forest, appellants additionally urge that the United States was under a statutory duty to keep the right of way clear of inflammable debris and to abate any hazard thereon. In this connection reference is made by appellants to Sections 5807 and 5818 of the Remington Revised Statutes (R.C.W. §§ 76.04.370, 76.04.450) *infra*, pp. 48-49. The former provides that land covered by inflammable debris shall constitute a fire hazard and requires the owner and the person, firm or corporation responsible for the existence of the hazard to abate it. Section 5818 declares it unlawful for any firm, person, company or corporation to do or commit any act which shall expose the forest or timber of the Olympic Peninsula to the hazard of fire.

Since it is not alleged that the Government committed any act upon the railroad right of way which contributed to the purported fire hazard thereon, we do not deem it necessary to consider Section 5818 at length here. And, insofar as Section 5807 is concerned, we submit that appellants err in contending that it gives rise to an obligation upon the part of a landowner to keep a railroad easement running across his property free of combustible matter.

What appellants' position amounts to is that, without expressly so stating, Section 5807 drastically

lying its right of way. The Court ruled that the Great Northern's easement for railroad purposes did not confer rights to materials below the surface of the right of way.

changes the common law so as to impose upon a servient owner civil liability for the act or omissions of the owner of the dominant estate. Indeed, their theory goes even further than that. Section 5807 is a criminal statute.⁶ Consequently, to interpret it as appellants suggest would be to hold a servient owner criminally responsible for statutory violations upon the part of the dominant owner, even though, unlike a landlord-lessor, the former in the absence of a contractual stipulation to the contrary has no duties with respect to the easement except the negative one of not interfering with the latter's use. See *e.g.*, *Bina v. Bina*, 213 Iowa 432, 239 N.W. 68; *Herman v. Roberts*, 119 N.Y. 37, 23 N.E. 442; *Moffett v. Berlin Water Co.*, 81 N.H. 79, 121 Atl. 22; *Jones on Easements* (1898) § 831.

This consideration alone, we think, would explain the inability of appellants to point to a single judicial decision, either in Washington or elsewhere, which reads the term "owner" in a safety statute of this character as encompassing the servient owner of property under easement. But there are still additional compelling reasons why the scope of the term is properly limited to persons entitled to present possession—whether or not that possession has been alienated under a lease, license or similar agreement. If, for example, the United States by virtue of its two incidents of ownership of the land constituting the right of way (*i.e.*, a reversionary interest on cessation of use of the right of way for railroad purposes and a right to prevent the railroad from using it for other than these purposes)

⁶ The violation of certain sections of title 36 of the Remington Revised Statutes, including Section 5807, constitutes a misdemeanor. See Section 5821 (R.C.W. § 76.04.480).

is to be held accountable as "owner" here, it would seem to follow logically that any holder of (a) a right of entry for condition broken, (b) a reversionary interest or (c) a contingent or vested remainder in forest land would similarly be an "owner" and liable for violations of the statute by the party in possession. Such a result would not only be absurd but also would plainly conflict with the established principle, followed in Washington, that a criminal statute must be strictly construed. See *e.g.*, *State v. Furth*, 82 Wash. 665, 678, 144 Pac. 907; *State v. Levy*, 8 Wash. 2d 630, 651, 113 P. 2d 306.

Moreover, while the justification for holding a lessor of timber lands accountable for fire hazards created by his lessee is apparent, the same cannot be said with respect to the servient owner of land under railroad easement. In the first place, it is equitable as well as necessary that the lessor, who after all directly benefits through rent from the forest operations of the lessee on his land which give rise to the hazard, share in the responsibility for its elimination. Secondly, the typical lease or license agreement is one for a defined limited period of time, at the conclusion of which possession of the land reverts to the owner. Consequently, the lessor out of possession will never be confronted with the necessity of assuming *in perpetuity* the burden of policing another's activities.

This is not the situation where possession of land is taken under the grant of an easement, especially where the easement is in the nature of a railroad right of way. The dominant owner, much like the owner of a determinable fee, takes possession in perpetuity, "to have and to hold" so long as the easement is used

for the purpose granted. See pp. 9-10, *supra*. This means that the servient owner and his successors in interest, if the statute were applicable to them, would have an uninterrupted responsibility for the condition of the surface of land which in all likelihood they will never regain possession of and from which, at the same time, they stand to derive no benefit. We think that it would take much more than Section 5807 as it now stands to attribute any such intent to the legislature.

II

The Allegations in the Complaint Respecting the Presence of Combustible Matter on Lands Adjoining the Right of Way Do Not State a Cause of Action Under the Tort Claims Act.

In addition to the allegations regarding the combustible matter on the railroad right of way, appellants' complaint asserts that there were slashings on Government lands adjoining the right of way. Again relying on Section 5807 and 5818 of the Remington Revised Statutes, see *supra* p. 13, and upon the common law, appellants urge that the mere presence of the combustibles calls for the imposition of liability upon the United States for the damage done to their property by the fire.

A. The Washington Statutes Relied Upon by Appellants Cannot Serve as the Basis for a Claim Under the Act.

There is no need to dispute that as to lands adjoining the railroad right of way, in contrast to the right of way itself, the United States is the "owner" within the meaning of Section 5807. Nor do we question that under the allegations of the complaint a private land-

owner in like circumstances would be susceptible to criminal prosecution irrespective of whether the fire hazard was created by affirmative acts on the part of himself or his employees, or instead was the result of the conduct of a third party—perhaps even a trespasser.

Indeed, in contrast to its predecessor, which conditioned criminal liability upon the prior receipt of official notice of the existence of the fire hazard,⁷ Section 5807 in terms imposes absolute criminal liability on the owner of land containing such a hazard solely because of his ownership. And it is for this reason that, even assuming that the Section looks to civil liability as well, it may not be invoked as a basis for recovery under the Tort Claims Act. Under the Act, the United States has consented to be sued only “for the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment”. 28 U. S. C. 1346(b), *infra*, p. 47. Cf. pp. 31-32, *infra*. Thus, the waiver of immunity does not extend to situations where the claim is grounded upon either a statute or common law doctrine which imposes absolute liability without fault. This was expressly recognized in *Dalehite v. United States*, 346 U.S. 15, 44-45, where the Supreme Court observed:

* * * there is yet to be disposed of some slight residue of theory of absolute liability without fault. This is reflected both in the District Court’s find-

⁷ Prior to its amendment in 1939, Section 5807 provided that land covered by inflammable debris “shall, if so declared by the supervisor of forestry, constitute a fire hazard * * *.” Notice of the existence of such hazard and of the requirement for its abatement had to be then transmitted in writing to the landowner and/or the person, firm, or corporation responsible for its existence.

ing that the FGAN constituted a nuisance, and in the contention of petitioners here. We agree with the six judges of the Court of Appeals, 197 F. 2d 771, 776, 781, 786, that the Act does not extend to such situations, though of course well known in tort law generally. It is to be invoked only on a "negligent or wrongful act or omission" of an employee. Absolute liability, of course, arises irrespective of how the tortfeasor conducts himself; it is imposed automatically when any damages are sustained as a result of the decision to engage in the dangerous activity. The degree of care used in performing the activity is irrelevant to the application of that doctrine. But the statute requires a negligent act. *So it is our judgment that liability does not arise by virtue either of United States ownership of an "inherently dangerous commodity" or property, or of engaging in an "extra-hazardous" activity. United States v. Hall, 195 F. 2d 64, 67.* [Emphasis supplied]

And the *Dalehite* holding since has been applied by the Third, Fifth and Tenth Circuits in refusing to extend the Tort Claims Act to liability without fault situations. See *Heale v. United States*, 207 F. 2d 414 (C. A. 3); *United States v. Inmon*, 205 F. 2d 681, 684 (C. A. 5); *Harris v. United States*, 205 F. 2d 765, 767 (C. A. 10).⁸

⁸ The above considerations of course would be equally applicable to appellants' claim grounded upon the alleged statutory violations on the railroad right of way. It was not necessary to discuss them in that connection because, as seen, the statute does not impose liability upon a servient owner for fire hazards left on an easement by the dominant owner.

B. An Adjoining Landowner Is Under No Common Law Duty to Guard Against the Negligent Act of a Railroad on Its Right of Way.

Because of the above considerations, appellants must demonstrate that under the allegations of the complaint common law liability would exist. This they cannot do.

It was long settled at common law that a landowner had an almost unlimited right to use his property as he saw fit. See *e.g.*, cases cited 12 L. R. A. (N. S.) 624. This meant that a property owner might store inflammable material on his land without incurring liability for the spread of a fire from adjoining land through the material onto other adjoining land. See *Bowers v. East Tennessee & W. N. C. R. Co.*, 144 N. C. 684, 57 S. E. 453. It similarly meant that a railroad which negligently had set fire to inflammable matter on neighboring property could not plead the presence of the matter as contributory negligence.

This is well illustrated by the decision of the Supreme Court in *Leroy Fibre Co. v. Chi., Mil., & St. P. Ry.*, 232 U. S. 340. There, the fibre company brought suit against the railroad to recover for the destruction of inflammable flax straw which had been stacked on the fibre company's property adjacent to the right of way and which had become ignited by a spark from a railroad locomotive. One of the questions certified to the Supreme Court was whether it was for the jury to decide if the flax straw owner was held to the exercise of reasonable care to protect the straw from a fire set by the negligence of the railroad. The Court held that it was not, observing that the fibre company was under no duty to conform its use of its own property to the

possibility of wrongful acts by the railroad on the right of way.

It is quite true that in recent years the common law rule has been somewhat modified. Some jurisdictions now adhere to the view that a landowner is responsible for damage to adjoining land from a fire originating in combustibles on his property, even if the fire started as the result of a negligent act of a trespasser on the property. Thus in *Prince v. Chehalis Savings & Loan Association*, 186 Wash. 372, 58 P. 2d 290, *affirmed on rehearing* 186 Wash. 377, 61 P. 2d 1374, the owner of a garage was held liable for the spread of a fire starting in his abandoned garage in circumstances where the garage was left in a state of disrepair and was used at night by itinerants. And in *Arneil v. Schnitzer*, 173 Ore. 179, 144 P. 2d 707, the same result was obtained where owners of a sawmill allowed inflammable debris to accumulate and an itinerant, entering upon the property, discarded a lighted cigarette in the vicinity of the debris.

At the same time, however, there was no suggestion in these cases that the common law rule was to be further modified to hold the owner accountable where, as here, the acts of negligence causing ignition of the combustibles take place on an adjoining railroad right of way. And while the Washington courts have not been confronted squarely with that question, it has been considered recently in California. In that jurisdiction, a landowner remains under no duty, in the use of his property, to guard against negligence by the railroad in the operation of its trains on a right of way. See *Atlas Assurance Co. Ltd. v. State*, 102 Cal. App. 2d 789, 229 P. 2d 13, 17, 19. Cf. *Kleinclaus*

v. *Marin Realty Co.*, 94 Cal. App. 2d 733, 211 P. 2d 582, 583-584. We know of no holding in any jurisdiction to the contrary.

C. The Allegations of Fact Do Not Indicate A Causal Relationship Between The Presence of The Combustible Matter And The Damage Complained Of.

While, in light of the foregoing, appellants' claim grounded upon the purported accumulation of slashings on the lands adjoining the right of way would fail in any event, we think it bears mentioning that the complaint does not allege facts sufficient to indicate a causal relationship between the presence of the inflammable debris and the damage that was sustained by appellants. True enough, there is a sweeping conclusion that this damage was the proximate result of the myriad acts of negligence charged to the Government, the Railroad, and Fibreboard (R. 22). But, in advancing appellants' version of events in some detail, the complaint fails to refer to a single fact which, if true, would suggest that the purported slashings had the remotest bearing upon the spread of the forest fire onto appellants' land. On the contrary, it does not even appear, either directly or by reasonable inference, that the slashings caught fire at all.⁹

⁹ The single specific reference to the slashings on Government lands is in paragraph XI of the complaint which merely alleges their presence and the existence of certain Washington forest safety statutes (R. 8, 9). In their allegations against the Railroad, appellants take care to point out that the fire originated in inflammable debris in and near the tracks on the right of way (R. 6). Yet the complaint is silent with respect to the ignition, at any time, of the slashings referred to in paragraph XI; let alone that the fire would not have spread but for the presence of the slashings. Cf. *Burr v. Clark*, 30 Wash. 2d 149, 190 P. 2d 769. And, even if this

It is of course basic to the law of torts that an act of abstract negligence cannot support the imposition of liability; facts must further be alleged and proved demonstrating that damage was proximately caused by the negligence. *Prosser on Torts*, pp. 177, 311 *et seq*; Green, *Rationale of Proximate Cause* (1927), pp. 3, 4. "Legal" or "proximate" cause is therefore an essential element of any cause of action sounding in negligence, whether it be based on the asserted violation of a common law duty or of a statute. Nor does it matter that the statute relied on imposes absolute liability or characterizes violations as "negligence per se". In either case, liability in tort is still entirely dependent upon a showing that the harm proximately resulted from the violation. See *e.g. Schatter v. Bergen*, 185 Wash. 375, 55 P. 2d 344.

III

Liability May Not Be Imposed Upon the United States Under the Tort Claims Act for the Asserted Negligence of the Forest Service in Fighting the Fire.

For the reasons developed above, it is plain that liability may not be imposed upon the United States for the consequence of the forest fire because of the alleged presence of combustible matter upon the railroad right of way and adjoining portions of the Olympic National Forest. The remaining question is whether the Tort Claims Act may be invoked to recover damages for the asserted failure of Forest Service personnel to fight properly the fire. We now demonstrate that the answer to the question is, as the District Court

debris had burned, the fact remains that the fire was under control in a 1600 acre area for over a month before a wind caused it to spread further and damage appellants' property (R. 13, 15).

held, in the negative. This follows from the fact that the actions of the Forest Service complained of were undertaken in the Service's capacity as a public fireman and, under the decision of the Supreme Court in *Dalehite v. United States*, 346 U. S. 15, claims grounded upon the performance of strictly governmental functions of this character are excluded from the coverage of the Tort Claims Act.

A. The Actions of the Forest Service Personnel in Fighting This Forest Fire on Public and Private Land Were Those of Public Firemen.

In their brief here (Br. p. 62), as in the court below, appellants attempt to characterize the fire suppression endeavors of Ranger Floe and his subordinates as merely the acts of a landowner upon whose property a fire has developed. As even a sketchy examination into the historical background and present functions of the Forest Service will reveal, however, nothing could be farther removed from the actualities of the matter. Even if in any of the phases of its wide-spread and complex activities the Forest Service appropriately could be analogized to the caretaker of private property, in its effort to prevent and suppress fires on forest land it serves the public at large as do local fire departments maintained by cities and towns to protect the property of their residents. And the Forest Service's operations in this important field can scarcely be dismissed as incidental; as will be seen they command, and deservedly so, a large measure of attention in the continuing effort by the Service, under its Congressional mandate, to further the conservation of forest resources essential to the general welfare.

1. Following the recommendations over a period of years of leading conservationists, who believed that such a step was essential to the preservation of the nation's timber supply, Congress in 1891 authorized the President to set apart and reserve forest lands of the public domain, whether bearing commercial timber or not, in any state or territory where such land is located. Act of March 3, 1891, c. 561, §§ 24, 26 Stat. 1103, as amended, 16 U. S. C. 471. Almost immediately thereafter, on March 30, 1891, President Harrison exercised this authority by proclaiming the Yellowstone Park Timberland Reserve. During the balance of the Harrison administration, and the subsequent Cleveland administration, several additional reservations were made.¹⁰

In spite of its clear purposes in terms of conservation, the 1891 Act made no provision for the protection and administration of the forest reserves; nor did it provide any regular method whereby the developing principles of forest management could be applied thereto. This deficiency was remedied in the Sundry Civil Appropriations Act of June 4, 1897, 30 Stat. 35, which stipulated that the Secretary of the Interior shall "make provisions for the protection against destruction by fire and depredation upon the public forests and forest reservations" and "may make such rules and regulations and establish such service as will insure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction". The Secretary

¹⁰ See Sparhawk, *The History of Forestry in America*, The Yearbook of Agriculture (U.S. Department of Agriculture, 1949), 702, 706.

of the Interior immediately undertook the administration and protection of the reservations, assigning the task to the then General Land Office which appointed a field force of supervisors and rangers.¹¹ The managerial responsibility remained in the Department of the Interior until 1905 when Congress transferred it to the Department of Agriculture, where it was placed in the hands of the Bureau of Forestry.¹² This Bureau, which was headed by Gifford Pinchot (one of the foremost American conservationists), became the Forest Service later in the same year and, in 1907, the forest reserves were renamed National Forests.¹³

At the time that the administration of the national forests evolved to the Forest Service, the then Secretary of Agriculture advised the Service in a formal communication to Chief Forester Pinchot that "it must be clearly bourne in mind that [these forests] are to be devoted to [their] most productive use for the permanent good of the whole people."¹⁴ For the past fifty years, this principle has been the Service's watchword in carrying out the duties in respect to the forests, which now are more than 150 in number and cover a total area in excess of 180 million acres.¹⁵ We cite here but a few examples. Timber management plans have been placed into effect to guide the growing and harvesting of timber crops in such a manner as will furnish

¹¹ *Id.* at p. 709. See also, *Our National Forests* (U. S. Department of Agriculture Information Bulletin No. 49, (1951)), p. 2.

¹² Act of February 1, 1905, c. 288, 33 Stat. 628. See also *Our National Forests*, *supra*, n. 11, at p. 2.

¹³ *Our National Forests*, *supra*, n. 11, at p. 2. See also Act of March 3, 1905, 33 Stat. 872.

¹⁴ *Id.* at p. 4.

¹⁵ *Id.* at p. 3. See also Annual Report of the Secretary of Agriculture (1952), p. 18.

“continuous supplies of timber for the people of the United States.” Range resources have been controlled to assure the best possible supply of forage year after year. Forestry and farming practices designed to protect watersheds and help prevent disastrous flood conditions have been put into effect. Recreational areas have been established for the use and enjoyment of outdoor enthusiasts. And the search is continuous for methods and means of increasing further the productivity of all national forest land.¹⁶

While national forest timber is sold to private individuals, such sales are permitted only in circumstances where the cutting and removal of the timber will serve the purpose of “preserving the living and growing timber and promoting the younger growth in national forests.” Act of June 4, 1897, as amended, 30 Stat. 35, 16 U. S. C. 476. Furthermore, the overall administration of the national forests produces an annual deficit for the Treasury.¹⁷ This deficit is enlarged by reason of the Congressional proviso that 25% of all moneys received from each national forest shall be paid to the state in which the forest is situated, to be

¹⁶ These and other functions of the Forest Service are described in some detail in *The Work of the U. S. Forest Service* (U. S. Department of Agriculture Information Bulletin No. 91 (1952)), pp. 5-20.

¹⁷ In the fiscal year 1950, for example, the Forest Service spent approximately 37 million dollars in the operation, management and protection of the national forests. National forest receipts during the same period totaled nearly 34.5 million dollars. *Our National Forests*, *supra*, n. 11, at p. 26.

While this serves to bring the nature of the Government's operation of the national forest system into better perspective, as will be seen below it does not matter for the purposes of the Tort Claims Act whether the national forests are managed on a profit or non-profit basis.

expended by the state for the benefit of public schools and roads. Act of May 23, 1908, c. 792, 35 Stat. 260, as amended 16 U. S. C. 500. And an additional 10 per cent of the receipts is available for expenditure on national-forest roads and trails in the state of origin. Act of March 4, 1913, 37 Stat. 843, 16 U. S. C. 501.

2. At the same time that the interests of conservation were being furthered through the development and expansion of the national forest system, there was an increasing awareness of the dire necessity of cooperation between federal and state governments in among other things the matter of providing protection against forest fires, *irrespective of their place of occurrence*. This awareness manifested itself first in the 1908 enactment of a statute directing the Forest Service to aid in the enforcement of the laws of the states and territories with regard to the prevention and extinguishment of forest fires. Act of May 23, 1908, c. 792, 35 Stat. 259, 16 U. S. C. 553.

Following a series of unprecedented forest fires in 1910, which burned millions of acres in Minnesota, Idaho, Washington, and Oregon,¹⁸ Congress decided to broaden the participation of the Forest Service in fire fighting activities. By Section 2 of the Act of March 1, 1911, c. 186, 36 Stat. 961, 16 U. S. C. 563, the Secretary of Agriculture was authorized to enter into cooperative agreements with states for the organization and maintenance of a system of fire protection on any private or state forest lands situated upon the watershed

¹⁸ See Guthrie, *Great Forest Fires of America* (U. S. Department of Agriculture 1936), p. 6; *Highlights in Forest Conservation* (U. S. Department of Agriculture Information Bulletin No. 83 (1952)), p. 9.

of a navigable river. And, in 1924, the Secretary's authority was further extended to include cooperative fire protection activities in all "the timbered and forest-producing lands" in "each forest region of the United States." Act of June 7, 1924, c. 348, 43 Stat. 653, 16 U. S. C. 564, 565.

As a result of these statutory provisions, the Forest Service now cooperates with 43 states in providing fire protection on state and private forest lands.¹⁹ This cooperation takes several forms.²⁰ The Service has underwritten a substantial portion of the cost of needed equipment and training activities. It helps state foresters in the latter's direction of organized fire prevention and control. It conducts nationwide fire prevention campaigns. It does extensive research into techniques and devices that will assist states and private landowners in fire prevention and suppression.

Further, the Service has entered into several agreements whereby it has assumed the function of undertaking the suppression of fires on *all* lands within a particular area, whether federally owned or not. As stated in appellants' complaint, such an agreement was outstanding in the area here involved and by its terms the personnel of the Forest Service were clothed with the duties and privileges of state forest wardens, including the right to conscript and impress men and equipment for fire suppression. And it should be noted that in Washington, as in some other jurisdictions, these wardens have among other duties the control and suppression of forest fires throughout the forest area of the

¹⁹ Annual Report of the Secretary of Agriculture (1951), p. 18.

²⁰ See *The Work of the U. S. Forest Service*, n. 16, *supra*, at pp. 12, 18; The Budget of the United States for the fiscal year ending June 30, 1955, p. 343.

state. See Rev. Code Wash. §§76.04.060, 76.04.070. In this capacity, they clearly perform the same functions in relation to the forest area as a municipal fire department performs in relation to the community it serves.

While the statistical data relating to Forest Service fire prevention and suppression activities, as above outlined, cannot tell the whole story, they do give a good picture of the present magnitude of those activities. During the fiscal year 1953, for example, the Service controlled 11,063 forest fires at a cost of more than 5 million dollars and spent approximately 9.5 million dollars in the execution of its cooperative fire protection agreements with state governments.²¹ The figures for the preceding year are no less impressive.²²

B. The Tort Claims Act Does Not Extend To Claims Grounded Upon The Assertedly Negligent Performance Of A Public Function.

It is clear from the foregoing that appellants' claim is grounded upon the assertedly negligent performance by the Forest Service of its long-standing and firmly rooted public function in connection with the prevention and suppression of forest fires. Even appellants' complaint itself stresses that this function was here undertaken not as owner of the national forest but rather in the stead of the state fire fighting service and with regard to both public and private lands. The question thus comes down, in the final analysis, to whether the Tort Claims Act permits the imposition of liability upon the United States for the performance of

²¹ Budget, n. 20, *supra*, pp. 338, 339, 343.

²² See Budget for the fiscal year ending June 30, 1954, pp. 402, 403, 406.

exclusively public activities which do not have a private counterpart.²³ The legislative history of the Act, its express terms, and the decisions of the Supreme Court construing it, indicate beyond doubt that the answer is in the negative.

The Tort Claims Act was passed by the 79th Congress in 1946 as Title IV of the Legislative Reorganization Act—the culmination of “some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment.” (*United States v. Spelar*, 338 U. S. 217, 219-220). Throughout this period, as the Supreme Court observed in *Dalehite v. United States*, 346 U. S. 15, 28, the prime legislative effort was to make the United States amenable to suit for automobile accidents—an example constantly repeated throughout the legislative history—and similar “ordinary” “common law” torts, and that purpose was expressly reaffirmed when the Act was passed.²⁴ Dur-

²³ That private persons may serve on occasion as state forest wardens by agreement with the State of Washington does not mean that they act in a private capacity or that there is a private counterpart to the activities of the Forest Service here. As the Supreme Court noted in *Labor Board v. Jones & Laughlin Co.*, 331 U.S. 416, 429 when a private individual is performing a public function under authority from the state he acts as a public officer and assumes all of the powers and liabilities attaching thereto. See also *Thornton v. Missouri Pacific R. Co.*, 42 Mo. App. 58; *Dempsey v. New York Central & Hudson River R. Co.*, 146 N.Y. 290, 40 N.E. 867; *New York C. & St. N. R. Co. v. Fieback*, 87 Ohio St. 254, 100 N.E. 889; *Neallus v. Hutchinson Amusement Co.*, 126 Me. 469, 139 Atl. 671.

²⁴ See e.g., 67 Cong. Rec. 11092, 11100; 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H.R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27-8; Hearings on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942, pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rep. No. 1400, 79th Cong., p. 31.

ing the same period, it was also the consistent view of Congress that the doors should not be opened to claims based upon acts of a "governmental nature" or, as stated by a member of the House Committee on the Judiciary, to "that class of tort on the part of the Government which has to do with a governmental function, so to speak."²⁵

This purpose, that liability was not to be imposed for United States activities undertaken in a special governmental context, was carried out in large measure by the exception in 28 U. S. C. 2680(a) of claims based upon acts or omissions in the exercise of a statute or regulation, or based upon the exercise or performance or the failure to perform a discretionary function or duty. Cf. *Dalehite v. United States*, *supra* at 30-36.²⁶ But it was also carried out through the vehicle of 28 U. S. C. 2674, read in conjunction with 28 U. S. C. 1346(b). Section 1346(b) confers jurisdiction upon

²⁵ Representative Gwynne speaking on H.R. 7236, 76th Cong. (86 Cong. Rec. 12021). See also 67 Cong. Rec. 11086-11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021-2; Hearings on H.R. 5373 and H.R. 6463, 77th Cong. (Jan. 1942), pp. 28, 33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

The Supreme Court summarized the legislative history in the *Dalehite* case in these terms [346 U.S. at 28]: "[I]t was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

²⁶ The 2680(a) exception was "intended to preclude any possibility that the bill might be construed to authorize suit for damages against the Government growing out of an authorized activity, such as a flood control or irrigation project, where no negligence on the part of any Government agent is shown, and the only ground for suit is the contention that the same conduct by a private individual would be tortious." Statement by Assistant Attorney General Shea, Hearings before the House Committee on the Judiciary, 77th Cong., 2nd Sess. on H.R. 5373 and H.R. 6463, p. 33, quoted in the *Dalehite* opinion, 346 U.S. at 30 (Emphasis supplied).

the district court over claims based on the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his employment, under circumstances where the United States, *if a private person*, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. Section 2674 provides that the assumed liability is only “in the same manner *and to the same extent* as a private individual under like circumstances.” (Emphasis supplied). See p. 47, *infra*.

If at any time there existed serious doubt that these latter Sections by their terms condition recovery under the Act upon the existence of a parallel private liability, and thereby preclude the possibility of the imposition of liability for the negligent performance of an activity which is uniquely governmental in nature, it was wholly dispelled by the decisions of the Supreme Court in *Feres v. United States*, 340 U. S. 135, and *Dalehite v. United States*, *supra*. In the *Feres* case, the Court held squarely that the Act waives the prior immunity from suit only as “recognized causes of action” and “does not visit the Government with novel and unprecedented liabilities” (340 U. S. at 142) and that, as a consequence, recovery will be denied in cases in which “plaintiffs can point to no liability of a ‘private individual’ even remotely analogous to that which they are asserting against the United States” (340 U. S. at 141).

These principles were applied with specific reference to public firefighting activities in the *Dalehite* case. There the claim was made that the Coast Guard had negligently performed its general public duty to fight the fire resulting from the explosion of fertilizer grade ammonium nitrate at Texas City and the district court,

rendering judgment against the United States, specifically found in this regard that the Coast Guard had been negligent "in failing * * * promptly and quickly" to "discover the fire on the *Grandcamp* * * * to use proper and efficient efforts to extinguish such fire on the *Grandcamp*," in "failing to remove the *Grandcamp* * * * [and the *Highflyer*] from the Texas City Harbor after fire was discovered thereon and before such explosion thereon," and in failing "to extinguish and prevent the spread of the fires in Texas City." The Court of Appeals reversed but, in doing so, did not discuss the merits of these findings. *In re Texas City Disaster Litigation*, 197 F. 2d 771 (C.A. 5). In its view of the case the degree of care that the Coast Guard exercised was of no consequence in light of the requirement that an analogous private liability be present.

The Supreme Court, in affirming the determination that the circumstances of the Texas City explosion did not impose liability upon the United States, took a similar position in regard to the negligence charged to the Coast Guard. The Court said [346 U.S. at 43-44]:

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"... the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with

the rationale of the decision has since been employed to strike down claims grounded upon the assertedly negligent performance of other uniquely public duties. *Indian Towing Company v. United States*, 211 F. 2d 886, (C.A. 5) and *National Manufacturing Co. v. United States*, 210 F. 2d 263 (C.A. 8) certiorari denied, 347 U.S. 967.

The claim in the *Indian Towing* case was based upon the asserted negligence of the Coast Guard in the maintenance of an aid to marine navigation and the district court dismissed the complaint on the authority of *Dalehite*. On the plaintiff's appeal, the Government observed that in maintaining navigational aids, as in fighting fires, the Coast Guard acts in the interest of the general public welfare. From this, it was urged that no analogous private liability could be found and that, as a consequence, the judgment should be affirmed. In a brief *per curiam* opinion, the Fifth Circuit agreed, stating simply that *Feres* and *Dalehite* were controlling and that "under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed."

In the *National Manufacturing Co.* case, the claim rested on the asserted negligence of government employees in the dissemination of weather and flood information respecting the disastrous overflow of the Kansas River in July 1951, the plaintiffs pointing to several commercial weather forecasting services (*e.g.* Western Union) as providing the requisite private analogy. The district court granted summary judgment to the United States and the Eighth Circuit affirmed. While placing its decision on several alternative grounds, the court gave express recognition to the fact

that the suggested comparison between the Weather Bureau and private forecasting agencies was wholly inapposite and that Sections 2674 and 2680(a), as interpreted by the Supreme Court, barred the claim. It said [210 F. 2d at 277]:

When the two sections are read in relation, as they must be, it becomes clear that Congress intended to prohibit imposition of liability upon the United States for activities undertaken by the United States in circumstances that are not like but differ in essential character from those in which any comparable private enterprises are carried on. "The Act did not create new causes of action where none existed before." If the activity is purely governmental there can be no liability under the Act which by its terms is conditioned on the liability of a private individual in like circumstances.

It is insisted, and we agree, that the information service on flood forecasts which the Weather Bureau is authorized to establish and maintain is a mere incident of the continuing government struggle to control the flooding of the rivers and minimize flood damage. The service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is dissociated from any private business counterpart and *is closely analogous to the action all governments must take against common enemies, foreign and domestic or against plagues and epidemics and against conflagrations* * * *.[Emphasis supplied.]²⁹

²⁹ Throughout appellants' brief there are references to the alleged fact that the Government owns and manages the timber lands of

C. The United States Owed No Actionable Duty to Appellants Under Its Fire Protection Agreement With the State of Washington.

In an endeavor to avoid the impact of the *Dalehite* decision, appellants contend that the cooperative fire protection agreement between the Forest Service and the State of Washington placed a specific duty in the Government owed to each property owner in the area, for the breach of which liability may be imposed upon the United States. This contention is wholly without merit.

the national forest in a "proprietary" capacity. These references indicate that appellants completely misunderstand the Government's position as the meaning of 28 U. S. C. 2674, which position was accepted by the Supreme Court in *Dalehite* and then applied in *Indian Towing* and *National Manufacturing*. We have never suggested that Section 2674 was intended to import the governmental-proprietary dichotomy familiar in the area of municipal liability in tort. On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle, irrespective of whether that vehicle was being employed in connection with what, in the case of a municipality, would be deemed a governmental or proprietary function. What we have urged instead is that where a traditionally public function is involved, and where the asserted negligence is in the performance of the function *itself*, Section 2674 prohibits the imposition of liability.

Translated into the terms of the instant case, appellants' claim is barred because it rests on the asserted failure of the Forest Service to extinguish properly the forest fire, the fighting of forest fires being one of the very duties the Forest Service performs (unlike private persons) for the benefit of the public at large. Had the claim rested on damages suffered as the result of a collision between a Forest Service vehicle engaged in fighting the fire, however, it would not have been so barred. In such circumstances, the failure to perform the governmental function of fire suppression would not have been involved. Indeed, from the standpoint of such a claimant, whether the public duty to suppress the fire had been carried out or not would have been of no consequence whatsoever.

As appellants are compelled to concede, the Forest Service, by virtue of the agreement in question, simply undertook certain public responsibilities normally resting upon Washington state forest wardens; *i.e.*, the suppression of fires on the forest lands covered by the agreement. And it perforce follows, even in the absence of the prohibition in *Dalehite* against imposing liability for the performance of public firefighting duties, that at the very most the liability of the Government to third persons in the performance of these transferred public responsibilities will be that of the state had the latter itself retained the responsibility of suppressing fires in the area and acted as the Forest Service did here. Stated otherwise, appellants scarcely can expect that, by taking over a state function, the Forest Service assumes greater potential liability than the state assumes when it performs the function.

The relevant inquiry on this aspect of the case, therefore, is into the extent of the liability of the State of Washington in circumstances where its forest wardens fail to exercise properly their statutory duty (see pp. 28-29, *supra*) to suppress fires developing in forest areas. Appellants fail to point to anything suggesting that there would be any liability whatsoever. And the fact of the matter is that Washington has long followed the universally accepted rule, referred to by the Supreme Court in *Dalehite*, to the effect that the activities of public firemen are conducted for the benefit of the public at large and as such do not create private actionable rights. See *e.g. Lynch v. North Yakima*, 37 Wash. 657, 80 Pac. 79; *Cunningham v. City of Seattle*, 40 Wash. 59, 82 Pac. 143; *Lawson v. City of Seattle*, 6

Wash. 184, 33 Pac. 347. See also *Hagerman v. City of Seattle*, 189 Wash. 694, 66 P. 2d 1152, 1156.³⁰

It is interesting to compare appellants' position here with that of the plaintiffs in the landmark case of *Moch v. Rensselaer Water Co.*, 247 N. Y. 160, 159 N. E. 896 wherein, because of its relation to fire protection, the assertedly negligent performance of a commercial service under contract with a municipality was held not to give rise to liability to private citizens. There, the defendant water company had entered into a contract with the city of Rensselaer to supply water to, *inter alia*, private homes and the city's fire hydrants. While the contract was in force, a warehouse close to Moch's property caught fire. The water company was notified of the fire but allegedly failed "to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress or extinguish the fire before it reached [Moch's warehouse]". Moch then brought suit against the water company both in contract and in tort, relying on the provisions of the contract between the water company and the city. The trial court denied a motion to dismiss the complaint. The Appellate Division of the Supreme Court of New York reversed and its determination was then affirmed by the New York Court of Appeals. Judge Cardozo, speaking for a unanimous

³⁰ As the court said in the *Lynch* case, [80 Pac. at 80]:

[I]t may generally be accepted that a city is not liable for an improper discharge by its officers of a purely governmental function * * * the services of [the fire department] are for the benefit of all persons who may have property in the city limits capable of injury by fire. It would seem, therefore, that in creating, maintaining, and operating the fire department the city was exercising governmental functions.

This statement was subsequently approved by the Court in the *Hagerman* case.

court, observed that no actionable duty rests upon a city to supply its inhabitants with protection against fire. As a consequence, a member of the public could not maintain an action by reason of the water company's contract to supply water for fire hydrants, unless the contract showed that the water company had expressly agreed to be answerable to individual members of the public in spite of the fact the city itself would not have been so answerable [159 N. E. at ~~898~~]. Judge Cardozo (897) went on to point out, in respect to the action in tort, that the so-called "good samaritan" rule, previously laid down by him in *Glanzer v. Shepard*, 233 N. Y. 236, 135 N. E. 275, 276, was not applicable, adding that [159 N. E. at 898, 899]:

The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance without reasonable notice of a refusal to continue, the quality of a tort. There is a suggestion of this thought in *Guardian Trust & Deposit Co. v. Fisher*, 200 U. S. 57 . . . but the dictum was rejected in a later case decided by the same court *German Alliance Ins. Co. v. Homewater Supply Co.* 226 U. S. 220 . . .) when an opportunity was at hand to turn it into law. We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty.³¹

³¹ It is true, as appellants suggest (Br. p. 59), that contractors with a municipality have been held liable to third persons for negligence in the execution of the contract. As an examination of

D. *The United States Breached No Duty Owing These Appellants By Reason Of Its Ownership Of The National Forest.*

In a further endeavor to escape the effect of the plain holding in *Dalehite*, appellants assert in essence that even if the United States would not otherwise be liable for the acts of the Forest Service in the performance of its public duty to fight forest fires on both private and public lands in the Olympic National Forest area, it is liable for them because of the Government ownership of the national forest. In this connection, they rely on Washington statutes and decisions requiring the owner of property upon which a fire originates to exercise due care to suppress it.

(1) As will be seen below, the provisions of Washington law pointed to by appellants have no relevancy here since the fire derived from acts committed by the Railroad on its right of way. But even if this were not the case, appellants' position would not be advanced.

the authorities they rely on will reveal, however, this occurs *where the contract calls for the undertaking of improvements to buildings and roads* and not where the contractor has assumed the performance of a traditional public function such as the providing of police or fire protection and the protection provided proves inadequate. Thus in *Wolten Grocery Co. v. Puget Sound Bridge & Dredging Co.*, 165 Wash. 27, 4 P. 2d 863, the dredging company contractor was held responsible for its negligence in filling in the city streets in a manner which damaged adjoining property.

Insofar as the volunteer fire company cases cited by appellants (Br. p. 60) are concerned, they do not turn to any extent upon the fact that the fire company was under contract with the city. Instead, they merely represent the minority rule, adopted in Connecticut and Rhode Island alone, that a volunteer fireman, as opposed to a paid fireman, can be held accountable for his negligence in the operation of a fire engine. There is, of course, no suggestion in either case that a volunteer fire company also may be held accountable to a property owner for the manner in which it fights a fire.

In the first place, that the United States may have owned land in the area has no bearing whatsoever upon the nature of the function being performed by the Forest Service under the cooperative agreement with the State of Washington. The situation can be readily analogized to that of a municipal fire department which is called upon to suppress fires on all property within its jurisdiction. We do not hear appellants to suggest that the fact that the city may itself own property, or that in the course of a particular conflagration that property may become ignited or endangered, affects the public character of the fire department's duties. It is clear, therefore, that appellants' claim is still one which is grounded upon the assertedly negligent performance of a public fireman and, for this reason, falls within the scope of the *Dalehite* decision.

There is, however, a second and equally fundamental reason why appellants' theory is footless. As they implicitly recognize, it must be demonstrated, in order to recover from the United States under the Tort Claims Act, that a private landowner in the situation of the Government would be liable to third persons in similar circumstances. Put in other terms, appellants must show that, if the national forest were privately owned and the extinguishment of a fire developing thereon was undertaken by the public firefighting body in the area (be it the Forest Service or the state forest wardens), the landowner would be held responsible for the acts or omissions of the fireman in the course of the undertaking.

Appellants cite no authority that will support the novel proposition that a private individual can be held answerable to others for the manner in which public officers and employees carry out their responsibilities

to the public at large.³² And insofar as we have been able to discover there is none. On the contrary, it is an established principle that an employer is not even liable for the wrongful acts of his own employees when such acts are done in the capacity of a public officer (*e.g.* special policeman) rather than primarily in their capacity as servant. *McKain v. B. & O. R. Co.*, 65 W. Va. 233, 64 S. E. 18; and see cases in Note, 23 L.R.A. (N.S.) 289. Cf. n 23, *supra*, p. 35. 30.

2. Assuming *arguendo* that a private person in any circumstances would be liable for the spread of a fire from his land to adjoining lands due to the negligence of a public fireman, he would not be so liable in the circumstances of this case. For the Washington Supreme Court in delineating the landowner's statutory and common law duty respecting fires *not set by him* has emphasized continually that it arises only in situations where the fire *originates* on his own property. See *e.g.* *Sandberg v. Cavanaugh Timber Co.*, 95 Wash. 556, 164 Pac. 200; *Jordan v. Spokane P & S Ry Co.*, 109 Wash. 476, 186 Pac. 875; *Walters v. Mason County Logging Co.*, 139 Wash. 265, 246 Pac. 749. And those other jurisdictions in which a landowner has any duty

³² Appellants' reliance (Br. p. 72) on *Galbraith v. Wheeler-Osgood Co.*, 123 Wash. 229, 212 Pac. 174 and *Wood & Iverson Inc. v. Northwest Lumber Co.*, 138 Wash. 203, 244 Pac. 712 is entirely misplaced. As the Supreme Court of Washington took pains to make clear in *Galbraith*, the state forester in burning the inflammable debris on the defendants land "acted in his *individual* and not in his *official* capacity" [212 Pac. at 176] [Emphasis supplied]. The court further indicated that the situation would have been otherwise had the activity not been undertaken by agreement with the defendant. We stress again that here the Forest Service had no agreement with any landowner to provide fire protection on his lands but instead had taken over a state public function in respect to the land of several corporations and individuals. Thus, it was acting in an official capacity, just as the state forest wardens would have been in like circumstances.

at all where the fire was not started by him place the same limitation. See, *e.g.*, cases cited 42 ALR 783, 821 *et seq*; 18 A. L. R. 2d 1081, 1097.

We have considered in another connection some of the principal reasons why a right of way granted to a railroad is, for the purposes of the statutory and common law obligations resting upon the owner of land, the property of the railroad. See *supra*, pp. 10-16. While we do not discuss them anew at this juncture, we think it is important to note that the reluctance of courts to hold responsible the owner of land upon which a railroad right of way is maintained is not restricted to instances where the claim is rooted in the alleged presence of inflammable materials on the right of way. Cf. p. 14, *supra*. For while there are innumerable cases holding the railroad accountable for its failure to prevent the spread of a fire developing on its right of way—following the very principle that appellants seek to apply against the United States—³³ there has not been to our knowledge a single occasion upon which the possessor of a reversionary interest has been held similarly accountable.³⁴

³³ See *e.g.* *Jordan v. Spokane, P & S Ry. Co.*, 109 Wash. 476, 186 Pac. 875 and cases cited 42 A. L. R. 783, 795, 812 *et seq.*; 18 A. L. R. 2d 1081, 1089, 1091. These cases show that if the fire did not originate through the negligence of the railroad it is liable only for the failure to exercise due care to prevent its spread. Absolute liability generally is imposed in circumstances where the fire was due to improper operation of a locomotive.

³⁴ For these reasons, the cases cited by appellants (Br. p. 42 *et seq*) holding a municipality liable for the spread of fire originating on its own land have no pertinence in relation to the instant case. It should also be borne in mind that in none of them was the claim grounded upon the failure of public firemen, in the performance of their duties as such, to extinguish a fire started by another. On the contrary, in most instances the fire was deliberately

CONCLUSION

Appellants here would hold the United States liable under the Tort Claims Act for the alleged damage to their property flowing from a fire which they concede was set by an improperly operated Port Angeles Western Railroad locomotive on the Railroad's improperly maintained right of way across the national forest and which, as the complaint itself shows, was fought by the Forest Service in the capacity of a public fireman. As the District Court correctly perceived, their claim has no substance when viewed in the light of the statutory and common law duties of a private landowner in the State of Washington, and in the light of the scope of the Government's waiver of immunity from suit in tort reflected by the Tort Claims Act.

It is respectfully submitted that the judgment of the court below should be affirmed.

WARREN E. BURGER,
Assistant Attorney General.

CHARLES P. MORIARITY,
United States Attorney.

FRANCIS N. CUSHMAN,
Assistant United States Attorney.

SAMUEL D. SLADE,
ALAN S. ROSENTHAL,
SONDRA KAPLAN,
Attorneys, Department of Justice.

OCTOBER, 1954

set by employees of the municipality itself for some purpose such as the burning of refuse and the claim was that the city failed to manage the fire properly. Thus these cases might assist appellants if the forest fire here had been set by Forest Service employees to clear off debris from the national forest and then ignored; a far cry from the actual situation wherein the Forest Service sought to extinguish a fire concededly set by the Railroad because it was under a public duty to do so.

1. The relevant provisions of the Federal Tort Claims Act are as follows:

28 U.S.C. 1346(b).

Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

*

*

*

*

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. The relevant provisions of the Revised Code of Washington are as follows:

Section 4.24.040 (R.R.S. § 5647).

Damages for negligently permitting fire to spread. If any person for any lawful purpose kindles a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property as a prudent and careful man would do, and if he fails so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage.

Section 76.04.370 (R.R.S. § 5807)

Abatement of fire hazards—Recovery of cost. Any land in the state covered wholly or in part by inflammable debris created by logging or other forest operations, land clearing, or right-of-way clearing and which by reason of such condition is likely to further the spread of fire and thereby endanger life or property, shall constitute a fire hazard, and the owner thereof and the person responsible for its existence shall abate such hazard. If the state shall incur any expense from fire fighting made necessary by reason of such hazard, it may recover the cost thereof from the person responsible for the existence of such hazard or the owner of the land upon which such hazard existed, and the state shall have a lien upon the land therefor enforceable in the same manner and with the same effect as a mechanic's lien. Nothing in this section shall apply to land for which a certificate of clearance has been issued.

If the owner or person responsible for such

hazard refuses, neglects, or fails to abate the hazard, the supervisor may summarily cause it to be abated and the cost thereof may be recovered from the owner or person responsible therefor, and shall also be a lien upon the land enforceable in the same manner with the same effect as a mechanic's lien. The summary action may be taken only after twenty days' notice in writing has been given to the owner or reputed owner of the land on which the hazard exists either by personal service or by registered letter addressed to him at his last known place of residence.

Section 76.04.450 (R.R.S. § 5818)

Olympic Peninsula area protection. All forests and timber upon all land in the state, lying west of a line one mile west of the eastern boundary of range ten west of the Willamette Meridian and north of the north boundary line of Grays Harbor county, shall be protected and preserved from the fire hazard caused by reason of the unusual quantity of fallen timber upon such land. It shall be unlawful for any person to do any act which shall expose any of the forests or timber upon such land to the hazard of fire.



United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED W. STEINER,
JOHN W. HADZIMA,
ROY PURSSELLEY,
NICHOLAS SPICUZZA,
OLIVE SPICUZZA,
GEORGE TODD
and CHARLES WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

HAROLD P. LASHER
530 Broadway, Suite 1048
San Diego, 1, California

Attorney for Appellant,
JOHN W. HADZIMA

FILE

FEB 20 1968

PAUL E. CENNE

TABLE OF AUTHORITIES CITED

CASES

	Page
Cavness vs. U. S., (9 Cir. 1951) 187 F. 2d 719.....	4
Chambers vs. U. S., (8 Cir. 1916) 237 Fed. 513.....	3
Briggs vs. U. S., (6 Cir. 1955) 221 F. 2d 636, 639.....	4, 5
Klose vs. U. S., (8 Cir. 1931) 49 F. 2d 177.....	3
Krogmann vs. U. S., (6 Cir. 1955) 225 F. 2d 220, 228 (14).....	5
Lewis vs. U. S., (1 Cir. 1924) 295 Fed. 441.....	3
U. S. vs. Rakes, (D. C. E. D. Va) 74 Fed. Supp. 645.....	3
Wheaton vs. U. S., (8 Cir. 1943) 133 F. 2d 522.....	3

No. 14512

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED W. STEINER, et al. ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR REHEARING

TO THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT, AND THE HONORABLE
JUDGES THEREOF.

Comes now JOHN W. HADZIMA, one of
the appellants in the above entitled cause, and presents
this, his petition for a rehearing of the above entitled
cause, and in support thereof, respectfully shows:

I

That the grounds upon which the appellant
JOHN W. HADZIMA relies for this his petition for re-
hearing are the following:

1. The Appellate Court overlooked in a
point a certain argument; that said argument was that

the government and not the appellant had the burden to dispel the presumption that communications between jurors and third persons are prejudicial to the rights of appellant.

2. The Appellate Court misapprehended an argument in a material way; that said argument so misapprehended was that the Trial Judge should have interrogated the rest of the jurors, and should have inquired into their knowledge of the two contacts; and if any, the panel being tainted should have applied the conclusive presumption of prejudice.

II

It is important that defendants be afforded a fair trial. In that respect defendants should be tried by impartial jurors who are not disturbed by outside influence or even mere opinion (verbal, newspaper or otherwise); nor by the least amount of guidance respecting any part or portion of the evidence which might or could be substituted by the juror in place of the evidence presented in the trial of the matter.

The Trial Judge had the foregoing in mind, he said: "It is well settled that communications relative to a case on trial between jurors and third persons or witnesses are not only improper but also presumptively prejudicial to the rights of defendants". (Record on appeal page 38). In the instant case two such known contacts occurred between a juror and a third person during the course of the trial. In relation thereto, the Trial Judge stated: "It likewise cast upon the government the burden to dispel such presumption and to show that no prejudice would or could result to the defendants or any of them. (Record on appeal page 39).

The following cases being cited:

Wheaton vs. U. S. , (Cir. 1943) 133 F. 2d 522; Chamber vs. U. S. , (8 Cir. 1916) 237 Fed. 513; Lewis vs. U. S. , (1 Cir. 1924) 295 Fed. 441; Klose vs. U. S. , (8 Cir. 1931) 49 F. 2d 177; Cavness vs. U. S. , (9 Cir. 1951) 187 F. 2d 719; U. S. vs. Rakes, (D. C. E. D. Va) 74 Fed. Supp. 645.

In connection with the motion for a new trial, based primarily upon the ground that a juror, to-wit, GLORIA ANN MILLER, had been in contact with a government witness, to-wit, LEE HEFNER, the Trial Judge also knew that another of the jurors, to-wit NANCY JARVIS had talked to a relative of the defendant FRED W. STEINER (Record on appeal, pages 51, 52 and 53).

After the juror NANCY JARVIS, had talked to the relative of the defendant FRED W. STEINER, the matter came to the attention of the Trial Judge when the juror Mrs. Jarvis called the Trial Judge to advise him of her discussion with this person. (Record on appeal pages 51 and 52).

Contrasted with the contact of the juror GLORIA ANN MILLER, by the government witness LEE HEFNER, the juror GLORIA ANN MILLER had not acted in such good faith; did not call the Trial Judge, but clandestinely or otherwise withheld this information from the Court in spite of the Court's admonitions. Such action on her part gives way to suspicion and conjecture regarding her good faith in disclosing her entire conversation with the government witness, LEE HEFNER. It would seem that her statements regarding her conversation with this government witness should have been viewed with distrust; and should have placed the

Court on further inquiry regarding the knowledge, of these contacts, of the entire jury panel.

Following the Jarvis incident, the Court stated in its opinion: "I also suggested that I interrogate all the jurors as to whether they had discussed the case with anyone or whether anyone had discussed or attempted to discuss the case with them". (Record on appeal Page 53).

In view of the foregoing, since the Trial Judge already had in mind interrogating the rest of the jurors following the Jarvis incident, this should have been done when the Hefner-Miller matter came to his attention. In the Cavness case, 187 F. 2d 719 (9 Cir. 1951) it states in effect, that where the irregularity has tainted the panel, prejudice must be conclusively presumed.

It is appellant Hadzima's contention that the Trial Judge did not go far enough in dispelling the presumption of prejudice; that there is left to conjecture whether the jury panel was tainted. The burden rested on the government in the exercise of the Trial Judge's discretion to fully dispel any possibility that the jury had by now become prejudiced toward the defendant. This burden it would seem could not be waived by a defendant or defendants since the matter would tend to go to the essence or substance of the trial; was not strictly a procedural matter. Briggs vs. U. S. , (6 Cir. 1955) 221 F. 2d 636, 639.

It is appellant Hadzima's further contention that a reasonable doubt now exists that other jurors did not know of the Jarvis and Miller contacts.

The Trial Judge or the government, while having the burden of proof to dispel the presumption of prejudice neither questioned juror Jarvis nor juror Miller regarding whether either or both spoke to any of the jurors respecting their contacts with third persons. The other jurors were not questioned whether they spoke to anyone or discussed with anyone the matter of the Jarvis and Miller contacts; and if so, what effect it had and the substance of such conversation. *Krogmann vs. U. S.*, (6 Cir. 1955) 225 F. 2d 220, 228 (14).

Particular prejudice was created against the defendant JOHN W. HADZIMA regarding the mention by Hefner of the Humorous incident; referred to in the Court's opinion. (Record on appeal pages 40, 41, and page 42). *Briggs vs. U. S.*, (6 Cir. 1955) 221 F. 2d 636, 638, 639. Hefner said she did mention the so-called humorous incident; Mrs. Miller stated she did not recall mentioning it.

This is to certify that in the opinion of counsel the foregoing petition for rehearing is well founded and is not interposed for the purpose of delay.

HAROLD P. LASHER,
Counsel for Appellant,
JOHN W. HADZIMA

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this petition for a rehearing be granted and that the judgment of the United States District Court, Southern District of California, Southern Division, be upon further consideration reversed.

Respectfully submitted,

HAROLD P. LASHER,
Counsel for JOHN W.
HADZIMA.

NO. 14512

IN THE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FRED W. STEINER, JOHN W.
ADZIMA, ROY PURSSELLEY,
NICHOLAS SPICUZZA, OLIVE
SPICUZZA, GEORGE TODD
and CHARLES WALKER,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF

CLIFFORD L. DUKE, JR.
Suite 400, U. S. National Bank Bldg.
Second Avenue and Broadway
San Diego 1, California

Attorney for Appellants.

FILED

MAY 12 1955

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

JURISDICTIONAL STATEMENT

Statement of Facts	1
Jurisdiction of the District Court	3
Jurisdiction of the Appellate Court . . .	3
Questions Involved on Appeal	3
Manner in Which Questions on Appeal were Raised	4
Statement of the Case	5
Appellant's Specifications of Errors .	6

ARGUMENT

I. APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED	7
II. THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW	10
III. THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18 UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THERE- FORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18 UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION.	11

TOPICAL INDEX, cont'd.

ARGUMENT, cont'd.

- IV. THE COURT FAILED TO COMPEL
THE GOVERNMENT TO ELECT
WHICH OF THE MANY SUBSTANTIVE
OFFENSES UPON WHICH EVIDENCE
HAD BEEN OFFERED THEY RELIED
UPON TO PROVE THE SPECIFIC
CHARGES IN ALL OF THE COUNTS
OF THE INDICTMENT 13
- V. THE APPELLANTS WERE
SUBSTANTIALLY PREJUDICED
AND DEPRIVED OF A FAIR
TRIAL BY REASON OF THE
FACT THAT A JUROR COM-
MITTED MISCONDUCT BY DIS-
CUSSING THE CASE WITH A
WITNESS SUBPOENAED BY THE
GOVERNMENT OUTSIDE THE
COURTROOM DURING THE COURSE
OF THE TRIAL. 15
- VI. CONCLUSION 18

TABLE OF AUTHORITIES CITED

Cases

Babb v. United States, 218 F. 2d 538 (5th Cir. 1955)	10
Curione v. United States, 11 F. 2d 471 (2d Cir. 1926)	9
Keck v. United States, 172 U.S. 434, 19 S.Ct. 254, 43 L. Ed. 505 (1898)	11
Mattox v. United States, 146 U. S. 140 (1892)	16
Palmero v. United States 112 F. 2d 922 (1st Cir. 1940)	8, 12
People v. Williams, 133 Cal. 165, 65 Pac. 323 (1901)	14
Ryan v. United States, 191 F. 2d 779 (D.C. Cir. 1951)	16
Stone v. United States, 113 F. 2d 70 (6th Cir. 1940)	16
Sunderland v. United States , 19 F. 2d 202, (8th Cir. 1927)	16
Thomas v. Hudspeth, 127 F. 2d 976, 978 (10th Cir. 1942).	14
United States v. Hess, 124 U. S. 483, 85 S. Ct. 571, 31 L. Ed. 516 (1887)	11
United States v. Marine, 84 Fed. Supp. 785, (D.Del. 1949)	15

TABLE OF AUTHORITIES CITED, cont'd.

Cases, cont'd.

United States v. Mueller, 178 F. 2d 593 (5th Cir. 1950)	8, 12
United States v. Rakes, 74 Fed. Supp. 645, (E. D. Va. 1947)	16
United States v. Reed, 274 Fed. 724 (D. C. N. Y. 1921)	9
United States v. Yuginovich 256 U. S. 450, 41 S. Ct. 55, L. Ed. 1043 (1920)	8
Wheaton v. United States, 133 F. 2d 522, 527 (8th Cir. 1943)	16

Statutes

Code of Federal Regulations, Title 42, Sec. 71.152	11
United States Code, Title 18, Sec. 371	10
United States Code, Title 18, Sec. 545	1, 2, 4, 5, 6 7 & 10
United States Code, Title 18, Sec. 3231	3
United States Code, Title 28, Sec. 1291	3
United States Code, Title 42, Sec. 264	8
United States Code, Title 42, Sec. 271	6, 8, 9, 10

No. 14512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED STEINER, et al. ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' BRIEF

JURISDICTIONAL STATEMENT

Statement of Facts

Appellants were indicted for conspiracy to violate Section 545 of Title 18, United States Code, and also on ten substantive counts charging violations of Section 545. (T 3 - 20)

The pertinent part of Section 545 of Title 18, United States Code reads:

"545. Smuggling goods into the United States. -- Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or

Whoever fraudulently or knowingly

imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law--

Shall be fined not more than \$5,000.00 or imprisoned not more than two years, or both.

(62 Stat. 716, 18 U. S. C. 545)

On September 2, 1953, a motion to dismiss the indictments was argued and denied (T 79, 95-117).

Appellants were brought to trial. The trial court dismissed counts 2 to 7 inclusive of the substantive counts. The jury rendered a verdict finding all of the appellants guilty of conspiracy under count 1. Appellants, Steiner, Hadzima, Nicholas Spicuzza, Pursselley, and Todd were found guilty on all four of the remaining substantive counts. Appellant, Olive Spicuzza, was found guilty on counts 8 and 9 of the substantive counts. Appellant, Walker was found guilty on counts 10 and 11 of the substantive counts.

Defendants filed a motion for new trial (T 20) Said motion was denied (T 64).

Notice of appeal was filed (T 76). Subsequently a designation of points on appeal was filed (T 74).

Appellant John Hadzima has substituted a separate counsel to represent him on appeal. Therefore, this brief is submitted on behalf of all appellants named herein, excepting John Hadzima.

Jurisdiction of the District Court

The trial court had the jurisdiction to try the alleged offenses charged in the indictment.

"-- The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States. "

(62 Stat. 826, 18 U. S. C. 3231)

Appellants deny the indictments were sufficient to state an offense against the United States.

Failure of the indictment to state an offense voids the verdict of the jury and sentence and judgment of the district court. It does not effect the power of the district court. Therefore, the district court had jurisdiction to hear the case.

Jurisdiction of the Appellate Court

Section 1291 of Title 28 of the United States Code vests appellate jurisdiction in the courts of appeals of all final decisions of the district courts of the United States.

The indictments (T 3 et. seq.) constitute the pleadings necessary to prove jurisdiction and venue in the district court hearing the matter.

Questions Involved on Appeal

The issues presented by this appeal are:

1). May appellants be charged in the indictment and convicted of felonies under a general law when the particular acts charged are misdemeanors under a specific law?

2). May appellants be convicted of felonies based on an indictment which charges appellants committed particular acts "contrary to law" without stating the specific law appellants' acts

contravened?

3). Does the term "merchandise", as used in Section 545, Title 18, United States Code, include birds of the psittacine family?

4). Is it error for the trial court to refuse to compel the prosecution to elect which substantive offense, upon which they had offered evidence, they relied upon to prove the specific charges in the counts of the indictment?

5). Were the appellants prejudiced and deprived of a fair trial by the fact that a juror discussed the case with a witness subpoenaed by the government outside the courtroom during the course of the trial?

Manner in which Questions on Appeal
were Raised

The question of charging a felony when the act was a misdemeanor under a specific law was raised in a motion to dismiss the indictment for failure to state an offense under 18 U. S. C. 545 (T 95 et. seq.). The questions of failure of the indictment to state the specific law violated by appellants' acts was raised in the same motion attacking the sufficiency of the indictment.

The question of whether the word "merchandise" includes psittacine birds was raised in said motion.

The question of electing the substantive offense relied on to prove the counts was raised as on alternative motion to the motion to dismiss the substantive counts on October 15, 1953 (T 35).

The question of misconduct of a juror depriving appellants of a fair trial was raised in the motion for a new trial (T 20).

Statement of the Case

Appellants were convicted of conspiracy to violate Section 545 of Title 18, United States Code.

Subsequent to the jury's verdict, one of the counsel for appellant received information of misconduct by a juror. Affidavits alleging said misconduct were filed and motion for a new trial submitted. The trial court determined the misconduct was not prejudicial. Appellants contend this ruling of the court was in abuse of its discretion and prejudicial error.

Both before and after trial the court refused to dismiss the indictment and ruled that the indictment sufficiently stated the offenses charged therein. The court concluded that regulations of an executive department, issued pursuant to authority granted by statute, were not of equal dignity with the statute allegedly violated by appellants. Therefore, the court reasoned that the rule that one can not be punished under a general law when his act is punishable under a specific law was not applicable. Appellants contend the conclusion of the court was erroneous and prejudicial i. e. the general statute under which they were prosecuted is a felony while the specific law violated by their alleged acts makes said acts misdemeanors.

The trial court held the Government does not have to elect which substantive counts, it has offered evidence on, upon which it relies to prove the offenses charged. Appellants contend failure to grant their motion to compel an election is prejudicial error. This is so, for without an election, some jurors may rely on certain evidence to prove a specific count, other jurors on other evidence to prove the same count; resulting in an apparently unanimous verdict based on different evidence.

The court ruled that the indictment stated a sufficient offense. Appellants contend this is error in that the term "contrary to law" without

stating the particular law, is too vague and uncertain to state an offense.

Appellants' Specification of Errors

The following errors of law in the district court are specified by appellants as grounds for reversal.

- 1). Conviction and sentencing of appellants under the provisions of Section 545 of Title 18, United States Code, when the offenses charged were punishable as misdemeanors under a specific law, i. e. Section 271 of Title 42, United States Code.
- 2). Conviction of appellants of offenses set out in an indictment charging only the commission of acts "contrary to law" without stating the specific law violated.
- 3). Conviction of appellants for importing, transporting and receiving psittacine birds contrary to Section 545 of Title 18, United States Code when said psittacine birds are not "merchandise" within the meaning of the word as used in 18 U. S. C. 545.
- 4). The district court's denial of appellants' motion to compel the Government to elect the substantive offenses, on which evidence was offered, on which they relied to prove the specific charges set out in the indictment's substantive counts.
- 5). Refusal of the district court to grant appellant's motion for new trial when a juror was guilty of misconduct prejudicial to appellants.

ARGUMENT

I.

APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED.

Appellants were charged with conspiracy to violate both paragraphs of Section 545 in Count I of the indictment (T 2-14). The district court dismissed Counts II, III, IV, V, VI and VII of the indictment at the conclusion of testimony. (T34). Count VIII of the indictment charged importation of psittacine birds contrary to law (T 18). Count IX charged appellants received, concealed and facilitated the transportation and concealment, after importation of psittacine birds, knowing they were imported contrary to law (T 18-19). These offenses allegedly took place April 3, 1952. Count X corresponded to Count VIII and Count XI to Count IX, except the offenses in these counts were alleged to have taken place September 22, 1952

All four of these substantive counts were based on the second paragraph of Section 545, the "contrary to law" section. It is clear that the two paragraphs of Section 545 define two distinct and separate offenses.

Count I charges a conspiracy to violate 18 U. S. C. Section 545, by importing psittacine birds without invoicing or declaring same at the port of entry.

To require the appellants to declare illegally imported merchandise violates the privilege against self-incrimination. It is a demand that appellants admit illegal importation or be punished for failure to admit illegal importation. To compel a defendant to admit crime A or be punished for crime B, could not be the intent of the first paragraph of Section 54 Congress intended to compel the declaration of legally imported merchandise. This is borne out by the addition of the second paragraph punishing importation of illegal merchandise. The indictment does not charge a conspiracy to violate any

other law. Thus, no offense is charged unless it is unlawful to import pscittacine birds under Section 545 of Title 18, U. S. C. .

It is a general proposition of law that where a specific law punishes a particular offense, an accused must be punished under that specific law rather than a general law covering the same act, especially if the specific provides a lesser penalty than the general. The specific controls the general. See United States v. Yuginovich, 256 U. S. 450, 41 S. Ct. 55, 65 L. Ed. 1043 (1920); United States v. Mueller, 178 F. 2d 593 (5th Cir. 1950); Palmer v. United States, 112 F. 2d 922 (1st Cir. 1940).

The offenses allegedly committed by appellants are punished by specific laws prohibiting importation of pscittacine birds.

Section 264 of Title 42, United States Code, authorizes the Surgeon General to pass regulations to prevent introduction of communicable diseases into the United States.

Section 264 provides:

"(a) The Surgeon General... is authorized to make and enforce such regulations as in his judgment are necessary to prevent the introduction, ... of communicable diseases from foreign countries into the States or possessions. "

Pursuant to these powers vested in him by Congress, the following regulation was put into force and effect:

"(b) ... pscittacine birds shall not be brought into the continental United States... " (Sect. 71.152 (b) of Title 42, United States Code of Federal Regulations)

Since the above regulation is pursuant to 42 U. S. C. 264, it is specifically punished by the terms of Section 271 of Title 42, United States Code.

42 U. S. C. Section 271 provides:

"(a) Any person who violates any regulation prescribed under . . . this title, . . . shall be punished by a fine of not more than \$1,000.00 or by imprisonment for not more than one year, or both. "

Thus importation of pscittacine birds is prohibited and punished by a specific law. If the regulation is not equal to a statute prohibiting importation it is not law. The result would be importation of pscittacine birds would not be contrary to law under the second paragraph of Section 545 of Title 18 U. S. C. and none of the substantive counts in the indictment state an offense. If the regulation prohibiting importation is law, then importation is punishable as a misdemeanor under specific law and it was error to convict and sentence appellants under Section 545. Curione v. United States, 11 F. 2d 471 (2d Cir. 1926) held that the bribery of a customs official under the Tarriff Act was misdemeanor though made a felony under a general bribery section. See also United States v. Reed, 274 Fed. 724 (D. C. N. Y. 1921). Therefore it was error to convict and sentence appellants under the general smuggling law of 18 U. S. C. 545 when the exact offenses alleged in the indictment were punishable under the specific laws of Sections 264 and 271 of Title 42, United States Code.

Further, evidence of Congressional intent to control the offense under the particular law and not the general is shown by the dates of amendment. Section 271 of Title 42 U. S. C. was amended June 25, 1948 (Chap. 646, Sec. 1, 62 Stat. 909). Section 71.152 of Title 42, C. F. R. was amended November 15, 1952 (16 F. R. 11604). 18 U. S. C. 545 was amended June 25, 1948 (C. 645, Sec. 1, 625 Stat. 716). It is based on and substantially the same as former Section 1593 of Title 19, June 17 1930, (C. 497, Title IV, Sec. 593, 46 Stat. 751). Thus Congress must be presumed to have been aware of the effect of their later amendements of

42 U. S. C. 271, i. e. to control the general provisions of 18 U. S. C. 545, since the more recent statute on the same subject repeals prior ones to the extent they cover the same subject.

Where the offense, as here, is a misdemeanor by a specific law, it can not be punished as a felony under the conspiracy statute. Title 18 U. S. C., Section 371 provides in part:

"If, however, the offense the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. "

The indictment was challenged for only alleging offenses under 18 U. S. C. 545. The court erroneously denied appellants' motion to dismiss. (T97-

II.

THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW.

Counts VIII, IX, X and XI of the indictment allege various acts of the appellants to be "contrary to law." The counts are couched in the terms of 18 U. S. C. 545. No law is specified in the indictment to have been contravened. Such an indictment states no offense. It is fatally defective for vagueness and uncertainty.

In Babb v. United States, 218 F. 2d 538 (5th Cir. 1955), the indictment charged that the defendants had knowingly, wilfully and fraudulently concealed, transported, and facilitated the transportation of certain merchandise, to wit: approximately eight head of cattle, after importation, each knowing the same to have been imported and brought into the United States contrary to law. The Babb indictment, like the one in this case, failed to specify

any law contravened. In a unanimous opinion the Court of Appeals reversed the conviction and held that the indictment was totally defective.

In Keck v. United States, 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505 (1898), the indictment charged importation of diamonds contrary to law. The Supreme Court held a charge of importing and bringing into the United States was vague and since it was not illegal per se to import merchandise and only illegal under specific statutes it did not convey the necessary information to the defendant.

In appellants' case the importation of psittacine birds is not illegal per se. 42 C. F. R. 71. 152 (b) (1) (2) provide for the lawful importation of such birds under certain conditions. It is only illegal to import psittacine birds under the specific sections of 42 C. F. R. 71. 152 passed pursuant to 42 U. S. C. 264.

See also United States v. Hess, 124 U. S. 483, 85 S. Ct. 571, 31 L. Ed. 516 (1887).

Appellants respectfully submit that all of the substantive counts in the indictment were fatally defective and the judgment imposed by the court below on said counts should be set aside.

III.

THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18 UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THEREFORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18 UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION.

Count I of the indictment charges one conspiracy between all the appellants to violate

a specific statute, i. e. Section 545 of Title 18 U. S. C. . The indictment nowhere charges a conspiracy to violate any other law.

Counts VIII to XI inclusive of the indictment charge separate violations of Section 545 of Title 18 U. S. C. in that appellants are alleged to have imported and transported psittacine birds contrary to law. The indictment nowhere charges a violation of any other law. Therefore, it is respectfully submitted that if psittacine birds are not merchandise within the meaning of 18 U. S. C. 545, then no count in the indictment states an offense against the United States.

Where a specific law deals with the imported articles, those articles are no longer "merchandise" as that term is used in 18 U. S. C. 545.

Palmero v. United States, 112 F. 2d 922,
(1st Cir. 1940).

In United States v. Mueller, 178 F. 2d 593, (5th Cir. 1950), the court held that a specific statute concerning importation of lottery tickets precluded the inclusion of these articles within the definition of the term "merchandise".

In the instant case specific laws deal with psittacine birds and their importation, therefore, they are not "merchandise" within the meaning of 18 U. S. C. 545.

The merchandise dealt with in the specific statute is presumed withdrawn from the general statute by legislative intent.

Appellants respectfully submit that the indictment failed to state any offense against the laws of the United States.

IV.

THE COURT FAILED TO COMPEL THE GOVERNMENT TO ELECT WHICH OF THE MANY SUBSTANTIVE OFFENSES UPON WHICH EVIDENCE HAD BEEN OFFERED THEY RELIED UPON TO PROVE THE SPECIFIC CHARGES IN ALL OF THE COUNTS OF THE INDICTMENT.

Count I of the indictment charges a conspiracy to commit three unlawful acts.

1). Conspiracy to import psittacine birds which should have been invoiced.

2). Conspiracy to import psittacine birds contrary to law.

3). Conspiracy to conceal and transport psittacine birds which had been imported contrary to law.

Counts VIII, IX, X and XI in the indictment charged offenses on April 3, 1952, and September 22, 1952. In the course of the trial a great number of witnesses testified. Their testimony covered a great many different periods of time. It touched on a great number of transactions allegedly engaged in by the appellants. The trial consumed a great deal of time.

Appellants have included a large amount of testimony in the record. The purpose is to show the large number of offenses on which the Government introduced testimony. Note that no specific dates are given as to the commission of the offenses. Thus, different jurors could rely on different offenses to sustain their verdict of guilty on the substantive counts. A motion to compel an election was reasonably presented. The trial judge concluded that

since the motion was made after the government rested it came too late (T 36). The trial judge felt the motion presented was not clearly shown to be one demanding an election.

The motion was not made too late. The motion may be made at the close of the evidence, Thomas v. Hudspeth, 127 F. 2d 976, 978 (10th Cir. 1942). The words quoted in the court's opinion clearly show the nature of the motion made.

"... I will make a sole motion at this time to compel the government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned. " (T 35)

The obvious reason for the rule is that, if no election is made and the jury is not otherwise informed as to which of the offenses, as to which evidence has been introduced, is the offense for which the defendant is on trial, a conviction might result if some of the jurors based their verdict upon the evidence of one of the offenses and the remainder of the jury based their verdict upon the evidence as to a different offense shown by the evidence and the result would be a verdict apparently unanimous, when in fact it was not. See People v. Williams, 133 Cal. 165, 65 Pac. 323 (1901). The reasoning of state courts on the rule is persuasive and the rule is recognized in federal criminal law, Thomas v. Hudspeth, 127 F. 2d 976 (10th Cir. 1942).

IV.

THE APPELLANTS WERE SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT A JUROR COMMITTED MISCONDUCT BY DISCUSSING THE CASE WITH A WITNESS SUBPOENAED BY THE GOVERNMENT OUTSIDE THE COURTROOM DURING THE COURSE OF THE TRIAL.

Appellants filed a motion for a new trial. One of the grounds for a new trial was misconduct by a juror (T 20).

The evidence showed that witness subpoenaed by the Government twice contacted a juror. That they spent considerable time together (T 717). They went to lunch together (T 727). The witness visited the juror in her home (T 739). Another suspicious circumstance was the fact that the witness made several attempts to contact the juror prior to their first conversation (T 738). Both the juror and witness admitted that there was some discussion of the case (T 699-746). All of these events took place during the course of the trial and outside the presence of the court.

United States v. Marine, 84 Fed. Supp. 785, (D. Del. 1949) is a case close in point. There a government witness and juror had lunch together on three successive days. The court stated:

"The number of times juror Number 7 and Flounders fraternized in the absence of previous acquaintance or any apparent mutual bond is sufficient to raise suspicious implication" . . .

"It is unnecessary to make a finding whether the case was actually discussed. It is sufficient that the discussion approached the subject matter of the case much more closely than the juror wished to admit."

"It would be impossible in most cases by the very nature of things to prove actual misconduct or that the case was discussed. What influences a particular juror necessarily must be vague and indefinite." (P. 787)

The improper contacts raised the presumption of prejudice to appellants, Wheaton v. United States, 133 F. 2d 522, 527 (8th Cir. 1943).

See also:

Mattox v. United States, 146 U. S. 140 (1892).
Ryan v. United States, 191 F 2d 779, (D. C. Cir. 1951).

Stone v. United States, 113 F. 2d 70 (6th Cir. 1940).

Sunderland v. United States, 19 F. 2d 202, (8th Cir. 1927).

United States v. Rakes, 74 Fed. Supp. 645, (E. D. Va. 1947).

The trial court examined the juror and contacting witness under oath (T 698 et. seq.) From the testimony of these persons and the trial judges conclusions as to their credibility it was ruled that there was no prejudice (T 45). However, no notice is paid to the fact that the first contact took place October 8, 1953. The court's examination was not made until October 29, 1953. In this length of time the parties might agree on a story. The juror's testimony indicates knowledge that to talk to a witness was improper. (T 730). The juror testified that her deliberations were not effected and she was not prejudiced or influenced. However, no one is naive enough to expect a juror to testify that she was influenced or prejudiced by such remarks. Her testimony is self serving. Any contrary admissions would be implicating.

Note that the witness corroborated testimony of a Government witness. Oscar Jones testified

he made delivery of birds to appellants. He testified he (Jones) delivered birds to Hefner (T 542). Hefner was the witness who contacted Mrs. Miller, the juror. Hefner testified he told the juror that Jone's testimony on delivery of birds to him (Hefner) was true (T 718-719). Mrs. Miller testified that Hefner's extra-judicial statements gave her the impression Jone's testimony was true (T 744). The result was corroboration of a principal witness's testimony. It is hard to conceive of a more prejudicial error. If the juror received the impression part of Jone's testimony was true, the inference arises that the juror believed the whole of said testimony to be true. The testimony of Jones was related to a number of substantive offenses, as well as overt acts indicating a conspiracy (T 493-555).

The failure of the juror to inform the trial court of the incident when it happened is an indication of guilty knowledge. Certainly the juror knew of the impropriety of the acts, why else would she be "scared to death" when questioned about the events (T 732). The juror's explanation that it resulted from stupidity doesn't overcome the presumption of prejudice. To so hold is to destroy the heart of Anglo-American justice, the jury system.

It is within the discretion of the trial court to decide if the misconduct was prejudicial. But, this discretion is narrowly confined by the need to maintain the sanctity of the jury system. The presumption of prejudice to defendants in a criminal case should not be lightly laid aside. To do so is to deprive defendants of their basic safeguard.

The court should consider the juror's misconduct as prejudicial to appellants. In a criminal prosecution all doubts should be resolved in favor of a defendant. To overcome the presumption of prejudice, the Government must prove beyond a reasonable doubt that the misconduct was of no

effect. Certainly there is more than a reasonable doubt when the effect of the misconduct was to corroborate the testimony of a key witness for the prosecution.

The possibility of prejudice was great in the case. The trial was long. There were a large number of defendants. The offenses charged were many. The evidence was voluminous. In light of these facts it would be difficult to say that the misconduct was not prejudicial.

V.

CONCLUSION

The appellants specify five separate grounds for reversal of their convictions. Any one of the errors, standing alone, compels a reversal. Any one of the errors was prejudicial.

An indictment failing to state an offense forces the defendants to trial without a proper chance to prepare a defense.

Conviction of a felony under a general law, when a specific law makes the offense a misdemeanor results in greater punishment than is specified.

Failure to compel the Government to elect which evidence they chose to rely upon to prove the offenses charged in the indictment deprived the appellants of their right to a unanimous verdict on each particular offense.

Conviction under a statute not covering the alleged offense is void.

Misconduct of a juror deprived appellants of their right to trial by an impartial jury.

It is respectfully submitted that this Honorable Court should reverse the convictions of all appellants on all counts.

Respectfully submitted,

CLIFFORD L. DUKE, JR.

Attorney for Appellants:

Fred W. Steiner
Roy Pursselley
Nicholas Spicuzza
Olive Spicuzza
George Todd and
Charles Walker.



AFFIDAVIT OF SERVICE BY MAIL

UNITED STATES OF AMERICA)
)
) SS.
SOUTHERN DISTRICT OF CALIFORNIA)

MARY F. ANDERSON, being first duly sworn,
deposes and says:

That she is a citizen of the United States and a resident of San Diego County, California; that her business address is Suite 400, U. S. National Bank Building, Second Avenue and Broadway, San Diego, California; that she is over the age of eighteen years, and is not a party to the above-entitled action;

That on May 10, 1955, she deposited in the United States mail at San Diego, California, in the above-entitled action, in an envelope bearing the requisite postage, three copies of:

APPELLANTS' OPENING BRIEF

addressed to : Laughlin E. Waters
United States Attorney
Southern District of California
Federal Building
Los Angeles, California

his last known address, at which place there is a delivery service of mail from the United States Post Office.

SUBSCRIBED AND SWORN to before
me, this 10th day of May, 1955.

Notary Public in and for County of
San Diego, State of California

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED W. STEINER,
JOHN W. HADZIMA,
ROY PURSSELLEY,
NICHOLAS SPICUZZA,
OLIVE SPICUZZA,
GEORGE TODD
and CHARLES WALKER,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee,

APPELLANTS' OPENING BRIEF

HAROLD P. LASHER
530 Broadway, Suite 1048
San Diego, 1, California

Attorney for Appellant,
JOHN W. HADZIMA



TOPICAL INDEX

Page

JURISDICTIONAL STATEMENT

Statement of Facts	1
Jurisdiction of the District Court	3
Jurisdiction of the Appellate Court	3
Questions Involved on Appeal	4
Manner in which Questions on Appeal were Raised	5
Statement of the Case	5
Appellant's Specification of Errors	7

ARGUMENT

- I. APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED 8
- II. THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW 12
- III. THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18, UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THEREFORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18, UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION 8

TOPICAL INDEX (Continued)

Page

ARGUMENT (Continued)

- IV. THE COURT FAILED TO COMPEL THE GOVERNMENT TO ELECT WHICH OF THE MANY SUBSTANTIVE OFFENSES UPON WHICH EVIDENCE HAD BEEN OFFERED THEY RELIED UPON TO PROVE THE SPECIFIC CHARGES IN ALL OF THE COUNTS OF THE INDICTMENT14
- V. THE APPELLANTS WERE SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT A JUROR COMMITTED MISCONDUCT BY DISCUSSING THE CASE WITH A WITNESS SUBPOENAED BY THE GOVERNMENT OUTSIDE THE COURTROOM DURING THE COURSE OF THE TRIAL16
- VI. CONCLUSION.....19

TABLE OF AUTHORITIES CITED

<u>Cases</u>	Page
Babb v. United States 218 F. 2d 538 (5th Cir. 1955)	12
Cavness v. United States 187 F. 2d 719 (9th Cir. 1951)	16
Finnegan v. United States 204 F. 2d 105, 109 (8th Cir. 1953) (1-3)	15
Keck v. United States 172 U.S. 434, 19 S. Ct. 254, 255, 43 L. Ed. 505, (1898)	13
Mattox v. United States 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917, (1892)	16
Murray v. United States 217 F. 2d 583 (9th Cir. 1954)	9
Palmero v. United States 112 F. 2d 922 (1st Cir. 1940)	9
Peckham v. United States 210 F. 2d 693, 697 (D. C. 1953)	15
Stone v. United States 113 F. 2d 70 (6th Cir. 1940) 77	17
United States v. Mueller 178 F. 2d 593 (5th Cir. 1950)	9

TABLE OF AUTHORITIES CITED (Continued)

<u>Cases</u> (Continued)	Page
United States v. Rakes 74 Fed. Supp. 645 (D. C. Va. 1947)	17
United States v. Reed 274 Fed. 724 (D. C. N. Y. 1921)	11
United States v. Yuginovich 256 U.S. 450, 41 S.Ct. 55, 65 L.Ed. 1043 (1920)	11

Statutes

Code of Federal Regulations Title 42, Section 71.152	9
United States Code, Title 18, Section 42, 43	7, 9, 10, 11
United States Code, Title 18, Section 43	10
United States Code, Title 18, Section 371	10
United States Code, Title 18, Section 545 ...	1, 2, 4, 5, 7, 8, 9, 11, 12
United States Code, Title 18, Section 3231	3
United States Code, Title 28, Section 1291	3
United States Code, Title 42, Section 264	9
United States Code, Title 42, Section 271	7

No. 14512

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FRED STEINER, et al. ,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S BRIEF

JURISDICTIONAL STATEMENT

Statement of Facts

Appellants were indicted for conspiracy to violate Section 545 of Title 18, United States Code, and also on ten substantive counts charging violations of Section 545. (T 3-20)

The pertinent part of Section 545 of Title 18, United States Code reads:

"545. Smuggling goods into the United States. --Whoever knowingly and wilfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which

should have been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice or other document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law--

Shall be fined not more than \$5,000.00 or imprisoned not more than two years, or both.

(62 Stat. 716, 18 U.S.C. 545)

On September 2, 1953, a motion to dismiss the indictments was argued and denied (T 79, 95-117).

Appellants were brought to trial. The trial court dismissed counts 2 to 7 inclusive of the substantive counts. The jury rendered a verdict finding all of the appellants guilty of conspiracy under count 1. Appellants, Steiner, Hadzima, Nicholas Spicuzza, Pursselley, and Todd were found guilty on all four of the remaining substantive counts. Appellant, Olive Spicuzza, was found guilty on counts 8 and 9 of the substantive counts. Appellant, Walker was found guilty on counts 10 and 11 of the substantive counts.

Defendants filed a motion for new trial (T 20). Said motion was denied (T 64).

Notice of appeal was filed (T 76). Subsequently a designation of points on appeal was filed (T 748).

Appellant John Hadzima has substituted a separate counsel to represent him on appeal. Therefore, this brief is submitted on behalf of John Hadzima.

Jurisdiction of the District Court

The trial court had the jurisdiction to try the alleged offenses charged in the indictment.

"--- The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."
(62 Stat. 826, 18 U.S.C. 3231)

Appellants deny the indictments were sufficient to state an offense against the United States.

Failure of the indictment to state an offense voids the verdict of the jury and sentence and judgment of the district court. It does not effect the power of the district court. Therefore, the district court had jurisdiction to hear the case.

Jurisdiction of the Appellate Court

Section 1291 of Title 28 of the United States Code vests appellate jurisdiction in the courts of appeals of all final decisions of the district courts of

the United States.

The indictments (T 3 et. seq.) constitute the pleadings necessary to prove jurisdiction and venue in the district court hearing the matter.

Questions Involved on Appeal

The issues presented by this appeal are:

- 1). May appellants be charged in the indictment and convicted of felonies under a general law when the particular acts charged are misdemeanors under a specific law?
- 2). May appellants be convicted of felonies based on an indictment which charges appellants committed particular acts "contrary to law" without stating the specific law appellants' acts contravened?
- 3). Does the term "merchandise", as used in Section 545, Title 18, United States Code, include birds of the psittacine family?
- 4). Is it error for the trial court to refuse to compel the prosecution to elect which substantive offense, upon which they had offered evidence, they relied upon to prove the specific charges in the counts of the indictment?
- 5). Were the appellants prejudiced and deprived of a fair trial by the fact that a juror discussed the case with a witness subpoenaed by the government outside the courtroom during the course of the trial?

Manner in which Questions on Appeal
were Raised

The question of charging a felony when the act was a misdemeanor under a specific law was raised in a motion to dismiss the indictment for failure to state an offense under 18 U.S. Code 545(T95 et seq.). The questions of failure of the indictment to state the specific law violated by appellants' acts was raised in the same motion attacking the sufficiency of the indictment.

The question of whether the word "merchandise" includes Psittacine birds was raised in said motion.

The question of electing the substantive offenses relied on to prove the counts was raised as an alternative motion to the motion to dismiss the substantive counts on October 15, 1953 (T 35).

The question of misconduct of a juror depriving appellants of a fair trial was raised in the motion for a new trial (T 20).

Statement of the Case

Appellants were convicted of conspiracy to violate Section 545 of Title 18, United States Code.

Subsequent to the jury's verdict, one of the counsel for appellant received information of misconduct by a juror. Affidavits alleging said misconduct were filed and motion for a new trial submitted. The trial court determined the misconduct was not prejudicial. Appellants contend

this ruling of the court was in abuse of its discretion and prejudicial error.

Both before and after trial the court refused to dismiss the indictment and ruled that the indictment sufficiently stated the offenses charged therein. The court concluded that regulations of an executive department, issued pursuant to authority granted by statute, were not of equal dignity with the statute allegedly violated by appellants. Therefore, the court reasoned that the rule that one cannot be punished under a general law when his act is punishable under a specific law was not applicable. Appellants contend the conclusion of the court was erroneous and prejudicial i. e. the general statute under which they were prosecuted is a felony while the specific law violated by their alleged acts makes said acts misdemeanors.

The trial court held the Government does not have to elect which substantive counts, it has offered evidence on, upon which it relies to prove the offenses charged. Appellants contend failure to grant their motion to compel an election is prejudicial error. This is so, for without an election, some jurors may rely on certain evidence to prove a specific count, other jurors on other evidence to prove the same count; resulting in an apparently unanimous verdict based on different evidence.

The court ruled that the indictment stated a sufficient offense. Appellants contend this is error in that the term "contrary to law" without stating the particular law, is too vague and uncertain to state an offense.

Appellants' Specification of Errors

The following errors of law in the district court are specified by appellants as grounds for reversal.

1). Conviction and sentencing of appellants under the provisions of Section 545 of Title 18, United States Code, when the offenses charged were punishable as misdemeanors under a specific law, i. e. Section 271 of Title 42, United States Code; Sections 42 and 43 of Title 18, United States Code.

2). Conviction of appellants of offenses set out in an indictment charging only the commission of acts "contrary to law" without stating the specific law violated.

3). Conviction of appellants for importing, transporting and receiving psittacine birds contrary to Section 545 of Title 18, United States Code when said psittacine birds are not "merchandise" within the meaning of the word as used in 18 U.S.C. 545.

4). The district court's denial of appellants' motion to compel the Government to elect the substantive offenses, on which evidence was offered, on which they relied to prove the specific charges set out in the indictment's substantive counts.

5). Refusal of the district court to grant appellant's motion for new trial when a juror was guilty of misconduct prejudicial to appellants.

ARGUMENT

I

APPELLANTS WERE ERRONEOUSLY CONVICTED OF VIOLATING A GENERAL LAW, WHEN A SPECIFIC LAW CONTROLLED.

III

THE TERM "MERCHANDISE", AS USED IN SECTION 545, TITLE 18, UNITED STATES CODE, DOES NOT INCLUDE BIRDS OF THE PSITTACINE FAMILY, AND THEREFORE THE INDICTMENT DOES NOT STATE ANY OFFENSE UNDER SECTION 545, TITLE 18, UNITED STATES CODE, OR THE OFFENSE OF CONSPIRACY TO VIOLATE SAID SECTION.

Appellants were charged with conspiracy to violate both paragraphs of Section 545, Title 18, U. S. Code in Count I of the indictment (T2-14) alleging the importation of Psittacine birds which should have been invoiced; importation of psittacine birds contrary to law; and the concealing and transporting of psittacine birds which had been imported contrary to law. Four substantive counts, VIII, IX, X, and XI, charged appellants with violating Section 545, Title 18, U. S. Code, that of importation, and with receiving and concealing after importation, psittacine birds.

Title 18, U. S. Code, Section 545 is a general statute and deals with any merchandise. However, it generally follows that where a specific statute deals with a "specified article", that article is no longer merchandise within the provisions of Section 545 ,

Title 18 U.S. Code, the specific law controlling the general law, and this being the case where Congress so intended. Palmero v. U.S., 112 F. 2d 922 (1st Cir. 1940), U.S. v. Mueller, 178 F. 2d 593 (5th Cir. 1950).

With respect to Psittacine birds, Section 264 Title 42, U.S. Code authorizes the Surgeon General to pass regulations to prevent introduction of communicable diseases into the United States. The regulation passed by the Surgeon General (Sec. 71.152 (b) of Title 42 U.S. Code Fed. Regs.) states in part "... Psittacine birds shall not be brought into the continental United States."

The question whether such regulation affected the general statute of which the defendant was charged, that of violating Section 545 Title 18 U.S. Code, was before this Circuit in somewhat a similar matter in the Murray v. U.S. Case, 217 F. 2d 583 (9th Cir. 1954).

However, in the Murray Case, the question of whether Sections 42 and 43 of Title 18 U.S. Code, apparently was not before this Circuit Court. And in this case appellants have always contended that the specific controls the general.

Sections 42 and 43 of Title 18 U.S. Code being statutes and not regulations, deal with animals and birds. Section 42 Title 18 U.S. Code states in part "... Nothing in this sub-section shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the

Secretary of the Interior may designate. "The violation of this section subjects one to a fine of not more than \$500.00 or imprisonment of six months, or both. This section was last amended May 24, 1949, c 139 Sec. 2, 63 Stat. 89.

Section 43 Title 18 U.S. Code states in part "Whoever transports, brings, or conveys, from any foreign country into the United States any wild animal or bird, . . . contrary to the law of such foreign country . . . etc. ; or whoever, knowingly purchases or receives any wild animal or bird . . . from any foreign country . . . in violation of this section . . . etc. ; or whoever, having purchased or received any wild animal or bird, . . . etc., imported from any foreign country or shipped, transported, or carried in interstate commerce . . . etc. " This section was passed June 25, 1948, c 645, 62 Stat. 687.

It was, no doubt, the intent of Congress to deal with birds and animals separate and apart from any and all merchandise which might be included in Section 545 of Title 18 U.S. Code. To hold otherwise would render Sections 42 and 43, Title 18 U.S. Code meaningless, since if birds are merchandise under Section 545, there would be no need for the specific statutes herein referred to.

It will be noted that the punishment provided for by Sections 42 and 43, Title 18 U.S. Code is that of a misdemeanor, and that Section 371 of Title 18 U.S. Code provides that the punishment for a conspiracy to commit a misdemeanor shall not exceed the maximum punishment provided for such misdemeanor.

With reference to the bringing in of the birds, the charges against appellants under Section 545 of Title 18 U. S. Code; in the U. S. v. Yuginovich Case, 256 U. S. 450, 41 S. Ct. 55, 65 L. Ed. 1043 (1920), it was there held that Congress must have intended to repeal the internal revenue laws in so far as they verbally or literally required performance of acts prohibited as crimes. And in the U. S. v. Reed Case, 274 Fed. 724 (D. C. N. Y. 1921), that Congress could not have intended to require the Captain of the vessel to make a report to the effect that he was committing a crime against the laws of the United States, in order to avoid liability for a penalty not expressly defined, but only forced out of language which, taken literally, is not broad enough to justify such interpretation.

In this case, we have the identical situation in which it could not have been expected of appellants to have made a report to the effect that they were committing a crime against the laws of the United States, when bringing in such birds specifically prohibited by the Surgeon General's regulation and Sections 42 and 43 of Title 18 U. S. Code.

II

THE INDICTMENT DID NOT STATE A PUNISHABLE OFFENSE IN ALLEGING ONLY THAT ACTS CHARGED WERE CONTRARY TO LAW.

In the indictment, counts VIII, IX, X, and XI, alleged various acts of the appellants to be "contrary to law". The counts follow 18 U.S. Code 545. No law is specified in said counts to have been contravened. Such indictment is fatally defective; and states no offense.

An indictment or information in the language of a statute ordinarily is sufficient, except where the words of the statute do not contain all the essential elements of the offense. If the statute omits an essential element, the indictment must supply it with certainty. Babb v. U.S., 218 F. 2d 538 (5th Cir. 1955).

Section 545 of Title 18 U. S. Code defines two separate types of offenses: That of smuggling or clandestinely introducing merchandise which should have been invoiced and that of importing or bringing in merchandise "contrary to law". There is a great difference between smuggling and importing, bringing in or receiving etc., since the first manifestly is unlawful per se, while importing, bringing in, receiving, etc., after importation is not. Babb v. U. S.

In this case the appellants in substantive counts VIII, IX, X, and XI, of the indictment (the remaining counts) were charged with having committed violations under the second distinct paragraph of the statute. The indictment in those counts

charged appellants with importing, and with receiving etc., after importation, merchandise, to-wit, birds, "contrary to law". The conspiracy count, parts One and Two (Tp4 & 5) likewise recites similar language and does not refer to some law chargeable against the appellants but states too that the acts committed by appellants as therein alleged were done "contrary to law". Contrary to what law therefore was not distinctly specified.

The Keck v. U.S. Case, 172 U.S. 434, 19 S.Ct. 254, 255, 43 L.Ed. 505, (1898), charged defendant with importing diamonds "contrary to law"; the indictment being there found fatally defective. It was held that the expression import and bring into the United States was vague and did not convey the necessary information to the defendant.

The Babb Case likewise held that the indictment should have alleged some fact or facts showing that the cattle were brought in contrary to some law; that it was not enough to say that they were imported or brought in "contrary to law".

The indictment here, in counts VIII, IX, X, and XI, does no more than that. It was asked to be dismissed. (Tp 95)

Accordingly it is respectfully urged that counts VIII, IX, X, and XI, failed to allege an offense against appellants and should be set aside.

IV

THE COURT FAILED TO COMPEL THE GOVERNMENT TO ELECT WHICH OF THE MANY SUBSTANTIVE OFFENSES UPON WHICH EVIDENCE HAD BEEN OFFERED THEY RELIED UPON TO PROVE THE SPECIFIC CHARGES IN ALL OF THE COUNTS OF THE INDICTMENT.

Counts VIII, IX, X, and XI, in the indictment charged offenses on April 3, 1952, and September 22, 1952. Count I of the indictment charged a conspiracy to commit three unlawful acts; that of, conspiracy to import Psittacine birds which should have been invoiced, conspiracy to import Psittacine birds contrary to law, and conspiracy to conceal and transport Psittacine birds which had been imported contrary to law.

In the course of the trial many witnesses testified. The testimony covered many different periods of time; and covered many transactions allegedly engaged in by the appellants. Appellants included a large amount of this testimony in the record. The purpose was to show the many offenses on which the Government introduced testimony.

After the Government concluded its case, appellants made their motion compelling the Government to elect the offenses they chose to rely in proof of the substantive counts or count. It was as follows:

"...I will make a sole motion at this time to compel the Government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned." (T 35)

The trial judge felt that this motion was not clearly shown to be one demanding an election. The trial judge concluded however, that since the motion was made after the Government rested, it came too late (T 36).

This was undoubtedly prejudicial to the appellants. The presentation of their defense was thereafter difficult.

It was also prejudicial in that different jurors could rely on different offenses to sustain their verdict of guilty on the substantive counts.

The motion was not made too late.

In Peckham v. U.S., 210 F. 2d 693, 697, (D. C. 1953) where after a motion to compel the Government to elect upon which counts it would proceed, being overruled, it thereafter develops to be prejudicial and is not cured by requiring an election or by other relief, material error would afflict the trial, (citing Dunaway v. U.S., 205 F. 2d 23, 24).

In Finnegan v. U.S., 204 F. 2d 105, 109, (8th Cir. 1953) (1-3) "If, however, the defendant felt that the testimony was such as to prejudice him in this regard he should have renewed his motion either at the close of the Government's evidence or at the close of the entire case. We have held that it may properly be interposed at the close of all the evidence." (Citing Bedell v. U.S. (8th Cir.) 78 F. 2d 358).

V

THE APPELLANTS WERE SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE FACT THAT A JUROR COMMITTED MISCONDUCT BY DISCUSSING THE CASE WITH A WITNESS SUBPOENAED BY THE GOVERNMENT OUTSIDE THE COURTROOM DURING THE COURSE OF THE TRIAL.

The appellants filed a motion for a new trial; one of the grounds specified was misconduct by a juror. The trial court interrogated the juror and the Government witness who contacted the juror; they were examined under oath (T 698 et seq.).

The evidence thus adduced showed that the said Government witness was with the juror twice; they spent considerable time together (T 717). Both the juror Gloria Miller and the witness admitted that they discussed the case somewhat (T 699-746). All of these events took place during the course of the trial and outside the presence of the court.

The trial court in the exercise of his discretion found that the appellants were not prejudiced thereby. The opinion of the trial court is reviewable.

In the Mattox v. U.S. Case, 146 U.S. 140, 13 S. Ct. 50, 36 L. Ed. 917 (1892) at page 50, the court said: "Private communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear. This portion of the Mattox Case was followed by this Circuit in the Cavness v. U.S. Case, 187 F. 2d 719, (9th

Cir. 1951), at 723. The question is one of prejudice; a matter for determination. And as was said in U. S. v. Rakes, 74 Fed. Supp. 645 (D. C. Va. 1947), 648: "the action of the court in such case as this depends upon the particular facts." However, in the Cavness Case it was said: page 723, "unless as a matter of policy prejudice must be conclusively presumed, as where the irregularity 'has tainted the panel. . . '".

In Stone v. U. S., 113 F. 2d 70 (6th Cir. 1940) 77, the court said: "The courts have exercised some discretionary power in dealing with the conduct of juries. . . and have not always disturbed verdicts for misconduct. . . (Klose v. U. S. 8th Cir. 49 F. 2d 177) but when jurors have communications with strangers, the case is different and cannot be dealt with so easily." And further said: "Jurors are human and not always conscious to what extent they are in fact biased or prejudiced and their inward sentiments cannot always be ascertained."

The question is not whether any actual wrong resulted from the conversations of Heffner, the Government witness, with the juror Miller, but whether it created a condition from which prejudice might arise, and unconscious opinion might be formed, or from which the general public would suspect that the jury might be influenced.

With regard to the jury panel itself, it is interesting to note that no questions were asked of juror Miller whether she imparted any of the information received from witness Heffner, to the jury, consciously (while the jury was deliberating) or unconsciously (while with the jury). It would have the effect of tainting the panel; be conclusively prejudicial

The irregularity undoubtedly left its mark on juror Miller; was an intrusion affecting the unbiased judgement of juror Miller, admittedly or not. It prevented her from thinking of, or expressing, acquittal for the defendants on fear of exposure; and is obviously a matter which would be denied by her. There was ample evidence from which prejudice could be ascertained. (T 698 et seq.)

The conduct of this juror and its effect on the jury was prejudicial to appellants and prevented them from having a fair trial.

VI

CONCLUSION

The appellants specify five separate grounds for reversal of their convictions and urge that the same be set aside. The errors specified are prejudicial to appellants and prevented them from having a fair trial.

It is therefore respectfully submitted that this Honorable Court set aside the convictions of all appellants on all counts and determine that the entire matter be reversed.

Respectfully submitted,

HAROLD P. LASHER,
Attorney for appellant
JOHN W. HADZIMA

No. 14512

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

FRED W. STEINER, JOHN W. HADZIMA, ROY PURSSEL-
LEY, NICHOLAS SPICUZZA, OLIVE SPICUZZA, GEORGE
TODD, and CHARLES WALKER,

Appellants.

BRIEF OF APPELLEE.

LAUGHLIN E. WATERS,

United States Attorney;

LOUIS LEE ABBOTT,

*Assistant United States Attorney,
Chief, Criminal Division;*

HARRY D. STEWARD,

Assistant United States Attorney;

HOWARD R. HARRIS,

Assistant United States Attorney,

600 Federal Building,
Los Angeles 12, California,
Attorneys for Appellee.

FILED

AUG 12 1955

PAUL P. O'BRIEN, CLERK



TOPICAL INDEX

	PAGE
I.	
Statement of the case.....	1
II.	
Jurisdiction	3
III.	
Issues	4
IV.	
Argument	5
A. Each count of the indictment charges either a violation of 18 U. S. C. 545 (illegal importation of merchandise, re- ceiving illegally imported merchandise) or a conspiracy to violate 18 U. S. C. 545.....	5
1. The quarantine regulation (42 C. F. R. 71.152(b)) promulgated by the surgeon general pursuant to 42 U. S. C. 264-271.....	5
2. Psittacine birds are merchandise.....	8
3. The animal, birds and fish sections of Title 18 United States Code (Sections 42 and 43).....	11
B. The substantive counts of the indictment charge the im- portation of merchandise "contrary to law." Such counts state an offense.....	13
C. The trial court did not err in refusing to compel the prosecution to elect which evidence it might designate to prove the substantive counts of the indictment.....	18
D. The trial court did not abuse its discretion in denying appellants' motion for new trial which motion was based on the fact that a person, who was under subpoena as a witness, discussed the case with one of the jurors during the trial	22
Conclusion	25

TABLE OF AUTHORITIES CITED

CASES	PAGE
Ansley v. United States, 135 F. 2d 207.....	20
Babb v. United States, 218 F. 2d 538.....	13, 14, 15, 17
Barnes v. United States, 197 F. 2d 271.....	25
Deaver v. United States, 155 F. 2d 740.....	13, 16
Donnelly v. United States, 185 F. 2d 559.....	14
Finnegan v. United States, 204 F. 2d 105.....	20
Gordon v. United States, 202 F. 2d 596.....	21
Kawakita v. United States, 343 U. S. 717.....	21
Keck v. United States, 172 U. S. 434.....	15, 16
Klose v. United States, 49 F. 2d 177.....	23, 24
Lii v. United States, 198 F. 2d 109.....	21
Lynch v. United States, 189 F. 2d 476.....	13
Miller v. United States, 300 Fed. 529.....	16, 17
Murray v. United States, 217 F. 2d 583.....	7, 8, 10
Palmero v. United States, 112 F. 2d 922.....	10
Richardson v. United States, 199 F. 2d 333.....	13
Ryan v. United States, 191 F. 2d 779.....	22
Stone v. United States, 113 F. 2d 70.....	23, 24
Todorow v. United States, 173 F. 2d 439.....	14
United States v. Beck, 118 F. 2d 178.....	17
United States v. Daily, 139 F. 2d 7.....	17
United States v. Dalton, 286 Fed. 756.....	12
United States v. Franklin, 188 F. 2d 182.....	14
United States v. Hess, 124 U. S. 483.....	14, 15
United States v. Kawakita, 96 Fed. Supp. 824.....	21
United States v. Kushner, 135 F. 2d 668.....	9
United States v. Perl, 210 F. 2d 457.....	14
United States v. Twenty-Five Pictures, 260 Fed. 851.....	10
United States v. Walker, No. 24499 (D.C., S.D.; Cal. May 27, 1955)	17

	PAGE
United States v. Williams, 202 F. 2d 712.....	17
Wong Lung Sing v. United States, 3 F. 2d 780.....	17

RULES AND REGULATIONS

Federal Rules of Criminal Procedure, Rule 7(c).....	13
Rules of United States Court of Appeals, 9th Cir., Rule 17(6)....	13
Rules of the United States Court of Appeals, Rule 18D.....	21
Code of Federal Regulations, Title 42, Sec. 71.152(b).....	7
Code of Federal Regulations, Title 42, Sec. 72.152(b)	4, 6, 8, 17

STATUTES

United States Code, Title 18, Secs. 42, 43.....	4, 11, 12
United States Code, Title 18, Sec. 42(a).....	11
United States Code, Title 18, Sec. 42(c).....	11
United States Code, Title 18, Sec. 371.....	1
United States Code, Title 18, Sec. 545	
.....	1, 2, 4, 5, 7, 9, 11, 12, 15, 25
United States Code, Title 18, Sec. 1621.....	7
United States Code, Title 19, Sec. 483(b)	9, 10
United States Code, Title 19, Sec. 1001	4, 8
United States Code, Title 19, Sec. 1401(c).....	8
United States Code, Title 19, Sec. 1461.....	5
United States Code, Title 19, Sec. 1481.....	5
United States Code, Title 19, Sec. 1482.....	5
United States Code, Title 19, Sec. 1484	6, 16
United States Code, Title 19, Sec. 1485	6, 16
United States Code, Title 19, Sec. 1593	5, 12
United States Code, Title 19, Secs. 1593(a), (b).....	9, 10
United States Code, Title 21, Sec. 173	10, 17
United States Code, Title 21, Sec. 174.....	10
United States Code, Title 26, Sec. 2833.....	14
United States Code, Title 26, Sec. 5606(a).....	14

iv.

	PAGE
United States Code, Title 31, Sec. 441.2	9
United States Code, Title 31, Sec. 443, Gold Reserve Act.....	9
United States Code, Title 31, Sec. 446.....	9
United States Code, Title 42, Secs. 264-271.....	6
United States Code, Title 42, Sec. 264.....	6
United States Code, Title 42, Sec. 271.....	6
United States Code, Title 19, Sec. 1201, par. 1638.....	9
United States Code Annotated, Title 28, Sec. 2255	7, 17
United States Constitution, Fifth Amendment.....	12

No. 14512
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

FRED W. STEINER, JOHN W. HADZIMA, ROY PURSSEL-
LEY, NICHOLAS SPICUZZA, OLIVE SPICUZZA, GEORGE
TODD, and CHARLES WALKER,

Appellants.

BRIEF OF APPELLEE.

(Reference to "Appellants" refers to all appellants.)

(Reference to "Appellants' Opening Brief" refers to that brief filed on behalf of those appellants represented by Clifford L. Duke, Jr.)

I.

STATEMENT OF THE CASE.

On August 5, 1953, an eleven count indictment was returned against the seven appellants herein and four others, charging all defendants with a conspiracy to smuggle psittacine birds into the United States [18 U. S. C. 371—Count One; Tr. pp. 3-14], with the illegal importation of psittacine birds [18 U. S. C. 545—Counts Two,

Four, Six, Eight and Ten; Tr. pp. 14-20], and with the receiving, concealing, and transportation of illegally imported merchandise [18 U. S. C. 545—Counts Three, Five, Seven, Nine and Eleven; Tr. pp. 14-20].

The conspiracy count charged a conspiracy beginning on December 10, 1949, and continuing to the return of the indictment. Thirty-five overt acts were set forth in this count. [Tr. pp. 6-44.]

The dates of the substantive counts were as follows:

Counts Two and Three—December 3, 1951

Counts Four and Five—January 26, 1952

Counts Six and Seven—March 10, 1952

Counts Eight and Nine—April 3, 1952

Counts Ten and Eleven—September 22, 1952.

The trial of the appellants and two others (two defendants were fugitives) commenced on September 29, 1953. [Tr. p. 119.]

The Government rested its case on October 14, 1953, and the defense started to put on their case. On October 15, 1953, the defense reminded the Court that the motion for judgment of acquittal on the substantive counts was still pending. This motion had evidently been made at the close of the Government's case on the ground of insufficient evidence. [Tr. p. 35.] In the alternate, counsel Duke, representing all defendants but appellant STEINER, moved to compel the Government to elect offenses on which it chose to rely to support the substantive counts of the indictment. The Court dismissed substantive Counts Two through Seven inclusive prior to the submission of the case to the jury. [Tr. p. 35.]

On October 21, 1953, the jury returned a guilty verdict as to appellants as follows:

STEINER—Counts One, Eight, Nine, Ten and Eleven

SPICUZZA—Counts One, Eight, Nine, Ten, and Eleven

OLIVE SPICUZZA—Counts One, Eight and Nine (Counts Ten and Eleven, Not Guilty)

HADZIMA—Counts One, Eight, Nine, Ten and Eleven

WALKER—Counts One, Ten and Eleven (not guilty —Eight and Nine)

TODD—Counts One, Eight, Nine, Ten, Eleven

PURSELLEY—Count One (Not Guilty, Eight, Nine, Ten, Eleven). [Tr. pp. 64-75.]

On October 21, 1953, appellants made a motion for a new trial. Affidavits were filed. Testimony was taken. [Tr. pp. 698-746.] On November 10, 1953, the motion for new trial was denied and a written opinion filed by the Court. [Tr. pp. 34-64.] On November 10, 1953, the Court imposed sentence. On November 16, 1953, the appellants filed their Notice of Appeal. [Tr. pp. 76-78.]

II. JURISDICTION.

Appellee refers to the foregoing Statement of Facts, *supra*. Appellee refers to the authorities referred to in Appellants' Opening Brief, p. 3, and Appellant HADZIMA's Opening Brief, pp. 3 and 4.

III. ISSUES.

Appellee does not admit that all issues were properly raised in the trial court. Where appellee has an objection on this basis it will be discussed in detail in the succeeding argument.

- A. Does the Tariff Act of 1930 (19 U. S. C. 1001, *et seq.*) and the basic customs penal provision (18 U. S. C. 545) include psittacine birds within their scope? Within this general question the following specific issues arise:
1. The effect of the Surgeon General's quarantine regulations (42 C. F. R. 72.152(b)) on customs laws.
 2. The scope of the term "merchandise" as used in 18 U. S. C. 545.
 3. The effect of the bird and animal sections of Title 18 U. S. C. (Secs. 42 and 43) on customs laws.
- B. Do each of the substantive counts of the indictment fail to charge an offense in that it is not charged what law or laws the importation is contrary to?
- C. Was error committed by the trial court in refusing to compel the Government to elect the substantive offense, upon which it had offered evidence, on which it relied, to prove the specific charges in the substantive counts of the indictment?
- D. Did the trial court abuse its discretion in denying appellants' motion for new trial on the grounds that a person, who was under subpoena as a witness, discussed the case with one of the jurors during the trial?

IV.
ARGUMENT.

- A. Each Count of the Indictment Charges Either a Violation of 18 U. S. C. 545 (Illegal Importation of Merchandise, Receiving Illegally Imported Merchandise) or a Conspiracy to Violate 18 U. S. C. 545.

Appellants contend that certain regulations and certain other statutes which pertain to either psittacine birds or birds and animals limit the scope of the basic customs penal law so far as the latter pertains to psittacine birds. These regulations and laws will be discussed in turn.

1. The Quarantine Regulation (42 C. F. R. 71.152(b)) Promulgated by the Surgeon General Pursuant to 42 U. S. C. 264-271.

Section 545, Title 18, U. S. C. is the basic customs penal provision concerning the smuggling and illegal importation of all merchandise into the United States.

Prior to 1948 the provisions of this section were contained in Title 19 U. S. C. Section 1593. As such, it was part of the Tariff Act of 1930 (Title 19, U. S. C., Chap. 4 (Secs. 1001, *et seq.*)). The provisions of the Tariff Act come down from a history of Tariff Acts stemming from the beginning of our Republic.

Section 1461 provides that "all merchandise and baggage imported or brought in from any contiguous country . . ." (exceptions provided) "shall be unladen in the presence of and be inspected by a Customs officer at the first port of entry at which the same shall arrive . . ." Sections 1481 and 1482 set forth the requirements

of "invoices" for merchandise to be imported into the United States. Section 1484 provides, with exceptions, that a consignee of imported merchandise, defined in Section 1483, shall make "entry" therefor. It further provides, "No merchandise shall be admitted to entry under the provision of this section without the production of a certified invoice. . . ." Section 1485 provides "(a) Every consignee making entry under the provisions of Section 1484 of this title shall make and file therewith, in a form to be prescribed by the Secretary of the Treasury, a declaration under oath stating. . . ."

The foregoing sets forth the customs law as it pertains to the special provision for inspection of merchandise imported from contiguous countries; and the basic customs law requiring an "entry", "invoice" and "declaration" for all merchandise brought into the United States.

The Surgeon General of the United States has promulgated certain regulations, 42 C. F. R. 71.152(b), pursuant to 42 U. S. C. 264-271. Section 264 authorizes the Surgeon General, with the approval of the administrator (referring to the Federal Security Administrator) "to make and enforce such regulations as in his judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions. . . ." Section 271 provides that, "Any person who violates any regulations prescribed under Section 264-266 of this title . . . shall be punished by a fine of not more than \$1,000.00 or imprisonment for not more than one year or both."

The pertinent regulations are set forth in Chapter I of 42 C. F. R. under the heading, Public Health Service.

(1955 Cumulative Pocket Supplement to 1949 Edition.) Subchapter F is entitled, "Quarantine, Inspection, Licensing." The first part of subchapter F is entitled "Foreign Quarantine." In sub part J, importation of certain things, such as cats, dogs, monkeys, dead bodies, lather brushes, and psittacine birds are dealt with. It is within this last category that Section 71.152(b) is set forth. This section provides as follows: "Psittacine birds shall not be brought into the United States for the purpose of sale or trade. Psittacine birds may be brought in only for the purposes and under the conditions prescribed. . . ." The regulations then provide that psittacine birds may be brought in, under certain specified conditions, for medical research, zoos, pets, and also if taken out of the United States may be admitted for return.

It would seem clear that Congress, in delegating to the Surgeon General certain powers to promulgate regulations in connection with the public health, including quarantine, inspection and licensing, did not intend to amend or repeal, in part, the Tariff Act of 1930 or to allow the Surgeon General by so promulgating such regulations to so amend or repeal it.

In *Murray v. United States* (9th Cir.), 217 F. 2d 583, November 23, 1954, opinion by Justice Fee, this very question was decided. The defendant was indicted for a conspiracy to violate 18 U. S. C. 545, and for perjury. (18 U. S. C. 1621.) He entered a plea of guilty to these counts and was sentenced. Thereafter the defendant filed motions for correction of sentence under 28 U. S. C. A. 2255, which were denied. Defendant appealed from the denial of these motions. One of the points raised on appeal was the very point now raised by appellants. The denial of the motion was affirmed. This Court in its opinion

stated that the imposition of a quarantine, as is imposed by the regulations, 42 C. F. R. 71.152(b), has no relation to the importation of goods contrary to law. The opinion continued:

“It is doubted that a mere police rule so motivated could dominate the field to the exclusion of express criminal statutes. In any event, no penalty is provided for importation specifically, and the authority is in an omnibus section of a general act which fixes penalties for violation of such regulations in general terms.”

The opinion concluded that no matter when the statute authorizing the promulgation of the regulation was adopted (it was adopted in 1944),

“It would not in any event have repealed the provisions of the statute directed against smuggling, which was passed in its present form in 1948 and fixes a definite penalty for such acts. The latter supersedes all prior statutes and overrules regulations no matter when adopted. *Callahan v. United States*, 285 U. S. 515, 52 S. Ct. 454, 76 L. Ed. 914.”

It is submitted that the *Murray* case completely answers the contentions of appellants on this issue.

2. Psittacine Birds Are Merchandise.

Merchandise is defined in the Tariff Act of 1930 (19 U. S. C. 1401(c)) as follows:

“(c) Merchandise. The word, ‘merchandise,’ means goods, wares, and chattels of every description and includes merchandise, the importation of which is prohibited.”

Live birds are subject to duty as set forth in par. 711, Section 1001, Title 19, U. S. C.

In *United States v. Kushner* (2d Cir.), 135 F. 2d 668, the defendant was convicted of five substantive counts of importing and assisting the importation of undeclared gold bullion from Canada and of six counts which charged a conspiracy to commit these offenses. The offenses were charged under Title 19 U. S. C. Secs. 1593(a) and (b) and Sec. 483(b), which sections were the predecessors to 18 U. S. C. 545. The appeal challenged, among other things, the illegality in any event of the importation of the undeclared gold bullion. Appellant maintained that gold being duty free (19 U. S. C. 1201, par. 1638), its importation did not violate the Customs Act; and that in any event the exclusive penalty for any unlawful dealing with gold, including importation, was under the Gold Reserve Act, 31 U. S. C. 443, which Act provided penalties for the acquisition and use of gold in violation of law.

The Court said:

"It seems clear, however, that the statutes, 19 U. S. C. A. Secs. 1461, 1484, which require the inspection and invoicing of all 'merchandise' brought into the country include duty-free gold bullion. . . . Merchandise (as) defined by 19 U. S. C. A. Sec. 1401(c) . . . is broad enough to include gold." (135 F. 2d 670.)

The defendant contended that inasmuch as 31 U. S. C. 446 provided that all laws inconsistent with the Gold Reserve Act were repealed, that 31 U. S. C., Sec. 443 was exclusive. The Court pointed out that Sec. 443 applied only to importation in disregard of regulations or licenses of the Secretary of the Treasury issued pursuant to Sec. 441.2, with a view to stabilizing the domestic

monetary economy. These sections were not inconsistent with Secs. 1593(a), 1593(b) and 483(b), as here directed at the impairment of the efficiency of customs administration by a failure to declare or invoice any imported gold. The Court said:

“Each statute stands for a separate function. . . . Furthermore, Sec. 443 is much more limited in scope than the penal provisions of the Customs Act. Repeals by implication are not favored; and where as here, there are reasonable grounds for the continued effectiveness of both statutes, a repeal will not be presumed. . . .” (135 F. 2d 671.)

Palmero v. United States, 112 F. 2d 922 (cited by Appellants (App. Op. Br., pp. 8, 12; App. Hadzima’s Op. Br., p. 9)) was distinguished in that in the latter case the Court condemned an attempt to punish twice the same violation under both the Narcotic Drug Import and Export Act (21 U. S. C. 173, 174) and under the Customs Act. The Court quoted from a decision by Judge Augustus Hand in *United States v. Twenty-Five Pictures* (S.D.N.Y.), 260 Fed. 851:

“The collation of information in order to pass upon the classification of merchandise, and the question often most difficult as to whether it is dutiable, and, if so, just what duty is imposed, is an important function of the revenue department of the government. Without such information, the Customs Act cannot really be enforced or the revenues collected.” (135 F. 2d 671.)

Essentially, the contention that psittacine birds are not merchandise is the same contention as discussed in the prior section. As such it is completely answered by the opinion of Justice Fee in the *Murray* case, *supra*.

3. The Animal, Birds and Fish Sections of Title 18 United States Code (Sections 42 and 43).

Appellant Hadzima raises the additional question of whether Secs. 42 and 43 of Title 18 remove psittacine birds from the operation of the basic customs penal provision, 18 U. S. C. 545. (App. Hadzima's Op. Br., pp. 9-11.) Section 42(a) prohibits the importation of certain animal and birds which are injurious to the interests of agriculture or horticulture. The statute lists such animals and birds and authorizes the Secretary of Interior to add other such birds and animals to the list. The statute then excludes certain cage birds, including domesticated parrots in the following language:

"Nothing in this subsection shall restrict the importation of natural history specimens for museums or scientific collections, or of certain cage birds, such as domesticated canaries, parrots, or such other birds as the Secretary of Interior may designate."

The plain meaning of this language is that parrots (psittacine birds) cannot be prohibited from being imported under 18 U. S. C. 42 and, thus, by the terms of the statute itself, parrots are excluded from its operation.

Section 42(c) and Section 43 deal with "wild animals and birds." Section 42(c) authorizes the Secretary of the Treasury to prescribe requirements and to issue permits for the transportation of "wild animals and birds." Section 43 deals with "wild animals and birds," unborn, alive or dead. Compare this to Section 42 which refers to parrots as "domesticated" "cage birds". There is nothing in the record which would include psittacine birds within the meaning of "wild animals and birds" and no such contention has been made previously.

The government respectfully submits that Sections 42 and 43 of Title 18 U. S. C. in no way alter or amend 18 U. S. C. 545 as the latter section applies to psittacine birds.

Appellant Hadzima makes the further contention that appellants did not have to make entry or declare the merchandise, *i. e.*, the birds, under the customs laws because to do so would have required them to incriminate themselves, presumably contrary to the Fifth Amendment of the Constitution. (App. Hadzima's Op. Br., p. 11.)

In *United States v. Dalton*, 286 Fed. 756, this contention was made. The charge was brought under Section 1593 of Title 19 U. S. C. (the predecessor to the present 18 U. S. C. 545). The Court said:

"It is obvious that the purpose was to smuggle and import into the United States the liquor to defraud the United States of the revenue, and while a permit is a prerequisite to entitle liquor to be entered, the fraudulent act in not obtaining a permit does not ripen the act into a right, and grant immunity from prosecution because the declaration would be incriminating. . . .

"It was incumbent upon the defendants, not only to declare the entry, but also to obtain a permit qualifying the goods for entry, and for having failed may not hide behind the Fifth Amendment when apprehended and evade penalty of the illegal act, and make a right out of two wrongs. The Fifth Amendment has no application where parties or goods seek admission into the United States."

B. The Substantive Counts of the Indictment Charge the Importation of Merchandise "Contrary to Law." Such Counts State an Offense.

Appellants have not properly raised this issue. At no time during the trial was the issue raised that any substantive count was insufficient for the reason that it did not charge what law the importation was contrary to or did not sufficiently advise the appellants of the crime of which they were charged so that the appellants could properly defend themselves at the time of trial. Appellants do not and cannot refer to any page of the transcript where this point was raised. (App. Op. Br., p. 4; App. Hadzima's Op. Br., p. 5.)

Deaver v. United States (Dist. Col.), 155 F. 2d 740, 743 (footnote 3);

Richardson v. United States (10th Cir.), 199 F. 2d 333, 335.

The point was not raised in the "Statement of Points Upon Which Appellants Rely." [Tr., pp. 748, 749.]

Rules of Court of Appeals, 9th Cir., Rule 17(6).

Under the present rules of pleading it is required that an indictment be a plain, concise, and definite written statement of the essential facts constituting the offense charged. An indictment in the language of the statute is sufficient unless the statute includes by implication an essential element which is not alleged in the indictment.

Rule 7(c). Federal Rules of Criminal Procedure; *Lynch v. United States* (5th Cir.). 189 F. 2d 476, 479 (decision by Judges Holmes who wrote the opinion in the *Babb* case, *infra*);

United States v. Franklin (7th Cir.), 188 F. 2d 182, 186;

Todorow v. United States (9th Cir.), 173 F. 2d 439, 447.

Compare the foregoing with the language of Justice Field in the case of *United States v. Hess*, 124 U. S. 483, where it is stated:

“Undoubtedly, the language of the statute may be used in the general description of an offense; but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.”

Modern pleading no longer requires such particulars. As stated in *Donnelly v. United States* (10th Cir.), 185 F. 2d 559, the specificity formerly held necessary to charge an offense is no longer required or sanctioned.

Form 5 of the Appendix of Forms of the Federal Rules of Criminal Procedure is a form indictment for violation of 26 U. S. C. 2833 (present Sec. 26, U. S. C. 5606(a)). The charge that “. . . John Doe carried on the business of a distiller without having given the bond as required by law” sufficiently charges the foregoing offense according to the approved form. See also *United States v. Perl* (2d Cir.), 210 F. 2d 457, 458.

Appellants rely on the case of *Babb v. United States* (5th Cir.), 218 F. 2d 538. In that case defendant was charged with receiving merchandise imported contrary to law, to-wit, cattle. A motion to dismiss was made by defendant on the grounds that the indictment did not advise them of what law the merchandise was im-

ported contrary to. A Bill of Particulars was filed setting forth statutes and regulations.

The Court held that the statute omitted an essential element of the indictment. It further held that this was not cured by the Bill of Particulars and cited *Keck v. United States*, 172 U. S. 434, as controlling. It is submitted that this result is neither required nor necessary under the *Keck* case.

The Court in the *Babb* case stated that it was significant that government did not allege in the Bill of Particulars that the cattle were smuggled, in violation of the first paragraph of Section 545. May we inquire, rhetorically, if such an allegation would have cured the indictment.

The Court in *Babb v. United States*, *supra*, relied on *Keck v. United States*, 172 U. S. 434, 19 S. Ct. 254, as do appellants in the instant case. It is submitted that the *Keck* case can be distinguished. In the *Keck* case the defendants were charged with bringing diamonds into the United States "contrary to law." A motion to quash and a demurrer to the indictment were overruled by the trial court. The United States Supreme Court said that the indictment should be tested by the standards set forth in certain cases including *United States v. Hess*, 124 U. S. 483, cited previously. The Court concluded that the count was clearly insufficient.

The facts of the *Keck* case show that a captain of a vessel was given a package to be delivered in the United States at the instance of the defendant, the contents of which were unknown to the captain. The package, in fact, contained diamonds which diamonds were not on the manifest list of the vessel. A treasury agent came aboard

the vessel at her arrival in port and upon demand the captain handed over the package which contained the diamonds.

The Court ruled that the diamonds had not been smuggled inasmuch as the time for the "entry", *i. e.*, invoicing and declaration, of the diamonds had not arrived; thus the government was relying on something other than the general requirements of entering, invoicing and declaring (19 U. S. C. 1484, 1485) to show the importation contrary to law. Inasmuch as the diamonds were not listed on a manifest of the vessel they would have been imported contrary to law (bottom of p. 442), but it would be some other customs law than the general provisions noted above. In this respect the defendant was not notified of the specific statute to which the importation was contrary. In the instant case, there is nothing in the record to show that the time for "entry" had not arrived. The presumptions to support the verdict would apply—that the merchandise was brought in contrary to the general requirements of the customs laws above noted.

In the *Keck* case, as previously stated, a motion to dismiss and a demurrer was overruled by the trial court. The question, having been properly raised by defendant, could be considered on appeal. In the instant case, no objection was made on this ground before the trial court. No request for a bill of particulars was made. While we do not admit the substantive counts are defective in any respect, if a defect in form it be, then it would have been cured by the verdict.

Deaver v. United States (Dist. Col.), 155 F. 2d 740;

Miller v. United States, 300 Fed. 529;

United States v. Beck, 118 F. 2d 178;

United States v. Williams (5th Cir.), 202 F. 2d 712 (this very pertinent decision is also by Judge Holmes);

United States v. Daily, 139 F. 2d 7.

The *Keck* case has also been validly distinguished in the past where it applies to items which cannot be imported.

Miller v. United States (6th Cir.), 300 Fed. 529, 533 (liquor);

Wong Lung Sing v. United States (9th Cir.), 3 F. 2d 780 (narcotics) ;

Babb v. United States, supra, 218 F. 2d 538, 541.

Yet opium can be imported into the United States for certain purposes and under certain conditions (21 U. S. C. 173); similarly, psittacine birds (42 C. F. R. 71.152(b)).

We quote from an opinion by Judge Weinberger in *United States v. Walker*, No. 24499 (D. C., S. D., Calif., May 27, 1955), in which the defendant moved to correct an illegal sentence, on the grounds here presented, under Section 2255, Title 28 U. S. C.:

“In the case at bar, the ‘merchandise’ was described, and consisted of psittacine birds; the fact that these birds transmit parrot fever to human beings is so widely known as to well nigh constitute the birds international outlaws; their importation is lawful only under ‘exceptional circumstances.’ It cannot be said that their importation is ‘presumptively lawful.’ ”

The innerquoted language refers to language used in *Miller v. United States, supra*. Thus, psittacine birds would fall within the *Miller* and *Sing* cases, *supra*.

It is respectfully submitted that the indictment sufficiently advises appellants of the nature of the offense. It includes all the essential elements of the offense. It would bar a second prosecution for the same offense. Repeatedly before and during the trial, the question of the quarantine regulations and the provisions of the Customs law were discussed. Thus, appellants were well aware of the charges on which they were tried and convicted. There is nothing in the record to show that the jury was not fully instructed on the meaning of the words, "contrary to law." It is submitted that the substantive counts of the indictment cannot at this late date be challenged on this ground.

C. The Trial Court Did Not Err in Refusing to Compel the Prosecution to Elect Which Evidence It Might Designate to Prove the Substantive Counts of the Indictment.

On October 14, 1953, during the course of the trial defendants made a motion to strike all evidence pertaining to Counts 2-11, *i. e.*, the substantive counts. [Tr. pp. 671-678; p. 35.] This motion was presumably made at the close of the government's case and was in effect a motion for judgment of acquittal on those counts. The matter of the procedure relating to the argument on this motion was first taken up in chambers the previous night. [Tr. p. 674.] On October 14 counsel presented their arguments, accordingly. [Tr. pp. 671-678, 682-688.] No mention was made of the motion to compel the government to elect at this time. On October 15, Mr. Duke,

counsel for all defendants, but appellant Steiner, during the trial of the case, made the motion which is the basis for this point as follows:

“May the record show that our Motion to Dismiss the substantive counts is still pending and in the alternative I will make a sole motion at this time to compel the government to elect, if any, offenses they choose to rely as far as the substantive counts are concerned.” [Tr. p. 688; p. 35.]

At some time prior to the submission of the case to the jury pursuant to the motion of defendants made at the conclusion of the government's case, the Court granted motion for judgment of acquittal on counts 2 through 7, inclusive. [Tr. p. 35.] On October 20, 1953, before submission of the case to the jury defendants made a Motion for Judgment of Acquittal on all remaining counts. [Tr. pp. 693, 694.] No mention was made at this time of the motion to compel an election.

Trial Court stated in its opinion: “I interpreted this brief statement” (referring to the above quoted motion to compel an election), “as referring to defendants' prior motion for dismissal of the substantive counts on the ground of insufficient evidence.” The Court then pointed out that pursuant to the motion for judgment of acquittal, it did dismiss six of the substantive counts. This left the remaining substantive counts, as covered by two dates: April 3, 1952 and September 22, 1952. [Tr. p. 35.]

Evidently, defense counsel did not make himself understood to the Court at the time the motion was made. At

least the Court did not at that time understand that a motion for election, as presently urged, was made by defendants. It is submitted that the trial court was justified in its interpretation of the motion under the circumstances.

If it is required that a motion be made first in the trial court before it can be considered on appeal, it is a corollary proposition that it must be made understandably. To mention it once in passing in the middle of the trial and not to mention it again until the motion for new trial would not be in accord with the letter or the spirit of the procedural law in this regard.

The failure to reassert the motion before the submission of the case to the jury would result in a waiver.

Finnegan v. United States, 204 F. 2d 105, 109
(motion to elect);

Ansley v. United States, 135 F. 2d 207 (motion
for judgment of acquittal).

By granting the motion for judgment of acquittal as to counts two through seven, inclusive, the trial court in effect limited the jury's consideration to but two dates. The fact that the jury was selective and acquitted certain of the defendants as to certain of the substantive counts further shows that the jury was not confused as to the evidence submitted.

It is the position of the government that in any event the court did not err in refusing to compel the government to designate which specific evidence should be considered as supporting a certain substantive count. For instance, if evidence was introduced which showed that smuggling in fact had occurred on two dates, April 1 and April 5, and the indictment charged the offense as

taking place on or about April 3, there is no reason why the evidence of smuggling on both dates could not be properly submitted to the jury. Certainly, the jury must agree unanimously on which date it finds the smuggling to have taken place. This can be assured by a request for a special verdict. (See *United States v. Kawakita* (D. C., S. D., Cal.), 96 Fed. Supp. 824, 851-2, in which the use of special verdicts was referred to approvingly by the Supreme Court in *Kawakita v. United States*, 343 U. S. 717, 737.) No request for a special verdict was made in the instant case.

It is also respectfully called to the attention of the court that the motion to compel an election as originally made pertained only to the substantive counts. [Tr. p. 688.] In Appellants' Opening Brief it is now contended that the motion referred to "all of the counts of the indictment" (p. 13) (*Cf.*, Specification of errors, p. 6 App. Op. Br.; similarly, App. Hadzima's Op. Br., p. 14).

Appellants have stated that "a large amount of testimony" shows the "large number of offenses" on which the government introduced testimony. (App. Op. Br., p. 13; App. Hadzima's Op. Br., p. 14.) Appellants have not referred to the page or pages of the Transcript on Appeal where these large number of offenses are set forth. This is contrary to Rule 18D of the Rules of the United States Court of Appeals for the 9th Circuit.

Gordon v. United States, 202 F. 2d 596;

Lii v. United States, 198 F. 2d 109.

It is submitted that under the circumstances the motion for election was not properly raised; further that it was waived by a failure to reassert the motion at the con-

clusion of the case. The issue is not properly presented by failure to reference to the Transcript. In any event the granting of the motion was within the discretion of the trial court. A failure to grant the motion was not an abuse of discretion.

D. The Trial Court Did Not Abuse Its Discretion in Denying Appellants' Motion for New Trial Which Motion Was Based on the Fact That a Person, Who Was Under Subpoena as a Witness, Discussed the Case With One of the Jurors During the Trial.

If the trial court had any discretion at all in a situation of this kind it is respectfully submitted that such discretion was properly exercised in the instant case.

The matter could not be better presented than did Judge Solomon, the trial court judge, in his opinion denying the motion for new trial. [Tr. pp. 38-64.] We would feel presumptive to re-present the factual matters discussed by Judge Solomon. The extremely strange happenings which occurred during the course of the trial impressed Judge Solomon considerably as is indicated by his opinion. His relation of the various occurrences gives an immediateness to these events—a closeness to the actual trial—which is not often found in transcripts on appeal. We will submit the matter on the facts as so thoroughly considered and stated.

In *Ryan v. United States*, 191 F. 2d 779, the defendants moved for a new trial because of conversations of the prosecuting attorney with several members of the jury during recesses in the trial. After an extensive hearing the trial court found that the defendants were not prejudiced in the slightest degree by the conduct of the district

attorney. In affirming the decision of the trial court, the Court of Appeals stated that a presumption of prejudice did arise from the fact that the conversations had taken place. However, such presumption was rebuttable. It was proper procedure to have a full hearing as to whether the jurors were in fact prejudiced. The Court distinguished *Stone v. United States*, 113 F. 2d 70, cited by appellants, in that the latter case involved an overture to a juror in the nature of bribery. The exercise of discretion by the trial court was proper.

In *Klose v. United States*, 49 F. 2d 177, which case is discussed in the opinion of Judge Solomon [Tr. pp. 60-62], the Court stated:

"It is not claimed that the misconduct was the result of any corrupt or improper influence practiced on the part of the government, nor that anyone connected with the trial of the case was in any degree responsible for the unfortunate incident or guilty of any reprehensible conduct with reference thereto. . . . It is the duty of the trial judge to maintain the integrity of trials by jury, and if it appears at any stage of the trial before verdict that misconduct of any juror or other person has tainted the panel with any sort of corruption or intimidation or coercion, the trial should be stopped and a mistrial granted. . . . Yet it does not follow that a mistrial should be granted whenever any evilly disposed person in no way connected with the parties, attempts to make improper remarks or advances to a juror or attempts to corrupt a juror." 49 F. 2d 181.

The Court of Appeals concluded that there was no abuse of discretion by the trial court denying a mistrial, and

no prejudice was shown by reason of the alleged misconduct and irregularity.

With the exception of *Stone v. United States, supra*, in no case cited by appellants was an exercise of discretion by the trial court reversed where competent evidence of the alleged misconduct was heard and the trial court did in fact exercise its discretion in the matter.

In the *Klose* case the court stated as follows: "Whether this juror had been guilty of misconduct, or had been subjected to improper influence affecting his verdict, was a fact to be determined by the trial judge." 49 F. 2d 181. In the instant case the court succinctly summarized the facts which it found to exist:

"The evidence of guilt is clear and convincing;

"The defendants, even before the trial commenced, had planned to obtain a mistrial:

"The action of at least one defendant indicated an attempt to obtain a mistrial—at least for himself.

"The defendants discounted the possible effect of a conversation between a juror and a relative of a defendant, which was disclosed by the juror during the trial;

"The defendants objected to measures proposed by the court to determine whether there was jury tampering so that steps could be taken to prevent it while two alternate jurors were available;

"The interest and sympathies of the person who talked with the second juror were with the defendants;

"The conversations between the second juror and such person were casual and referred to matters that

had already been admitted in evidence or which were favorable to the defendants;

“All the evidence concerning jury tampering which was within the power of the Government to produce was produced, but evidence which the defendants were in a position to disclose was suppressed.

“In view of the evidence and all of the facts and circumstances surrounding the alleged jury tampering, I am convinced that no prejudice did or could have resulted to the defendants or any of them, and I further find that it would be a miscarriage of justice to set aside the verdicts of the jury.” [Tr. p. 63.]

It is respectfully submitted that the question of bias and prejudice was susceptible of an intelligent judgment by the trial judge on the evidence adduced upon the hearing of the motion. Thus, the trial court properly exercised its discretion in refusing to grant a new trial.

IV.

Conclusion.

The Court imposed concurrent sentences only on Counts 8, 9, 10 and 11, that is, sentences concurrent with the sentence imposed on Count 1. [Tr. pp. 30-33, 64-75.] Therefore, unless the trial court erred with respect to the conspiracy count (Count 1), the judgment of the trial court would not be changed. *Barnes v. United States*, 197 F. 2d 271. The issues raised as to the sufficiency of the substantive counts (Sec. B, *supra*) and as to the motion to compel an election (Sec. C, *supra*) do not refer to the conspiracy count.

It is submitted that all counts of the indictment charge either a violation of or conspiracy to violate the basic customs penal provision, 18 U. S. C. 545.

It is submitted that the substantive counts of the indictment charge an offense against the laws of the United States.

It is submitted that the trial court properly exercised its discretion in refusing to grant a new trial.

It is respectfully submitted that the convictions of appellants in all respects should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

LOUIS LEE ABBOTT,
Assistant United States Attorney,

HARRY D. STEWARD,
Assistant United States Attorney,

By: HOWARD R. HARRIS,
Assistant United States Attorney.
Attorneys for Appellee.



